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No. 01-

IN THE SUPREME COURT

OF THE UNTED STATES

Cheri Smith,
Petitioner

Vs.

State of New Mexico

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT
FOR THE OF
STATE OF NEW MEXICO
PETITION FOR WRIT OF CERTIORARI

CHERI SMITH
Petitioner, Pro Se
P O Box 10877
Tempe, AZ 85284
480-710-0947

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QUESTIONS PRESENTED

1. Whether the Interstate Compact for Adult Offender Supervision, which passed 35 states on June19, 2002, and became active, now an important question of Federal Law *(28 U.S.C. § 1331)* and fall within Interstate Commerce? This Court has not previously decided this question, and the States of the United States are in conflict.
2. Whether a State of New Mexico Assistant District Attorney can file a Motion to Revoke Probation while Petitioner is Paroled to Arizona, guaranteed by Interstate Compact of Adult Supervision, now a question of Federal Law *(28 U.S.C. § 1331)*? Whether subject matter jurisdiction lies in Arizona since the elements found in Gagnon v. Scarpelli, 411 U.S. 778 and Morrissey v. Brewer, 408 U.S. 471 clearly established Federal law, as determined by the Supreme Court of the United States have not been met?
3. Whether a State of New Mexico State Assistant District Attorney committed Prosecutorial misconduct and/or vindictiveness by issuing Subpoena Duces Tecum as search warrants, (Illegal Search & Seizure) used to build the States case without Due Process of law; withholding discovery;

allowing State witness to commit perjury during trial; committing perjury in open court; filing a motion to revoke Petitioner's parole who had been transferred to Arizona; bringing charges against Petitioner from a Grand Jury Indictment which had been dismissed; leaving a conviction which was ordered to be dismissed by the New Mexico Court of Appeals, and adding to an Order of Probation placing Petitioner in Double Jeopardy, as well as the State of New Mexico State Assistant District Attorney contacting Petitioners Employers, Bank, Telephones, and Landlord, pretrial and post conviction proceedings without Due Process of Law thus harassing and stalking Petitioner and her family?

4. Whether a Conviction ordered dismissed by The New Mexico Court of Appeals, and added to an Order of Probation places Petitioner in Double Jeopardy? Whether charges from a Grand Jury Indictment, that had been dismissed places Petitioner in Double Jeopardy?
5. Whether the State of New Mexico Assistant District Attorney deprived Petitioner of a Speedy Trial by committing Perjury to the Supreme Court of the State of New Mexico?
6. Whether the State of New Mexico Courts erred in holding that Petitioner should not have counsel appointed given the

fundamental rights found in Gagnon v. Scarpelli, 411 U.S. 778 and Morrissey v. Brewer, 408 U.S. 471 as determined by this Court, were not fulfilled, as well as violating the Interstate Compact for Adult Offender Supervision a new question of Federal Law *(28 U.S.C. § 1331)*?

LIST OF PARTIES

The party to the proceedings in the State of New Mexico Courts

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Cheri Smith respectfully prays that a writ of certiorari issue to review the judgment of the State of New Mexico Supreme Court in this case.

OPINIONS BELOW

The Appendix A - Order of the Supreme Court of the State of New Mexico of November 4, 2003, Case 28,256. Appendix B – Motion for Reconsideration of Petition for Writ of Certiorari and Brief in Support of Motion for Reconsideration of Petition for Writ of Certiorari, October 20, 2003. The Appendix C - Order of the Supreme Court for the State of New Mexico of October 3, 2003.

JURISDICTION

The of Order of the Supreme Court for the State of New Mexico was issued on October 3, 2003, Motion for Reconsideration of Petition for Writ of Certiorari and Brief in Support of Motion for Reconsideration of Petition for Writ of Certiorari was timely filed on October 20, 2003, and denied by Order of the Supreme Court

for the State of New Mexico on November 4, 2003. This Court has jurisdiction over this petition under *28 U.S.C. § 1257* (a).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, § 10, Cl. 1 Congressional Law impairing the obligation of contracts

U.S. Const., Art. I, § 10, Cl. 3. Congressional consent transforms such a compact into federal law

U.S. Const., Art. III, § 2, Cl. 1, & 2 Judicial Power of United States

U.S. Code 4 U.S.C. § 112 Compacts between States for cooperation in prevention of crime; consent of Congress

28 U.S.C. § 1331 Question of Federal Law

28 U.S.C. § 1343 Civil rights and elective franchise

28 U.S.C. § 1257 State courts; certiorari

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New Mexico N.M.S.A. 31-5-20 Interstate Compact for Adult Offender Supervision (Appendix H)

STATEMENT OF THE CASE

This case is about the Interstate Compact for Adult Offender Supervision of Parole & Probationers and the State of New Mexico Assistant District Attorney's prosecutorial vindictiveness and conspiracy thereof to deprive Petitioner of fundamental rights and illegal imprisonment as a result thereof, placing Petitioner in Double Jeopardy and violating due process rights of Petitioner. Petitioner was indicted by the Grand Jury of San Juan County New Mexico and charges were brought (CR 98-00899-01), and a second grand jury indictment was brought (CR-98-00935-01). Petitioner asserted her right to a Speedy Trail, Discovery (Transcript of July 1, 1999 – Appendix I), and Witnesses to testify. Case CR 98-00899-01 dismissed for failure of a speedy trial, when Petitioner asserted her right the State of New Mexico Assistant District Attorney brought charges from the first grand jury indictment. Counsel raised vindictiveness, and double jeopardy, however the State of New Mexico claimed it was a "strategic move". Petitioner was tried and during the trial, the State deprived Petitioner of favorable witnesses, allowed perjury by States witness, withheld evidence, and violated due process. Petitioner was convicted

(Fraud, embezzlement, and a misdemeanor) and appealed. Judgment & Sentence of February 7, 2000 (Appendix G) sentences Petitioner 3 years on I Count, 3 years on Count II, and 6 Months on Count III running consecutively. Reversal was mandated by the New Mexico Court of Appeals on Count III on November 17, 2000. While appeal was pending, Petitioner served 18 months in prison and was released on February 7, 2001. Petitioner paroled through New Mexico N.M.S.A. 31-5-20 Interstate Compact for Adult Offender Supervision (Appendix H) on February 7, 2001 (2 years), which became a question of Federal Law on June 19, 2002. The State of New Mexico Assistant District Attorney (Price) filed A Motion to Revoke Probation (Appendix) while Petitioner was on Parole on September 28, 2001 which continues for sixteen (16) months and nine (9) hearings, which the Petitioner attended until January 14, 2003 at which time a warrant was issued, after Petitioner filed notice of appeal, violating Due Process Constitution of the United States, Amendment IV, V, & XI; Constitution of the State of New Mexico Article II, §10, §14, & §18.

BEST AVAILABLE COPY

Petitioner has been a resident of Arizona since February 7, 2001 with Parole granted and probation transferred. There have not been any parole or probation revocation actions filed by Arizona and no other charges pending in any state. This Court has ordered that Due Process requirements are found in *Morrissey v Brewer*, 408 U.S. 471 (1972) , *Gagnon v Scarpelli*, 411 U.S. 778 (1973), for a Parole or Probation Revocation, which is part states "Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." (Petitioner lives in Arizona and is summoned to appear for sixteen (16) months and nine (9) hearings to New Mexico.) New Mexico Interstate Compact Deputy Administrator presented testimony by Letter of October 30, 2001 (Appendix L-) that the State of New Mexico Assistant District Attorney (Price) initiated this proceeding not Parole or Probation, thus violating Due Process and fundamental rights guaranteed by Parole & Probation through Interstate Compact. The State of New Mexico Assistant District Attorney (Price) by her actions denies the Petitioner equal protection of the

law, interferes in Federal Law, and fundamental rights, and filed a motion to revoke without Due Process of law. *Edelman v. Jordan*, 415 U.S. 651 (1974) cites: *In Ex Parte Young*, 209 U.S. 123 The State of New Mexico Assistant District Attorney (Price) then uses her position to issue Subpoena Duces Tecum on the Petitioners Landlord, Banks, Telephone, and Employers. *United States v. Keen*, 509 F.2d 1273 (6th Cir. 1975). *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385. During these proceedings, Petitioner learns that the State of New Mexico Assistant District Attorney committed Perjury, deceit, malicious abuse of process pretrial and post-conviction proceedings. The State of New Mexico Assistant District Attorney filing charges from a grand jury indictment, which had been dismissed, prior to trial, raising prosecutorial vindictiveness *Blackledge v. Perry*, 417 U.S. 21 (1974) and double jeopardy. The Court of Appeals for the State of New Mexico mandates a conviction be removed on November 17, 2000; the conviction not removed and in a hearing on November 13, 2001(Appendix F) the State of New Mexico is advised of the Double Jeopardy, *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The Double Jeopardy is added to an order

of probation on November 15, 2001. The State of New Mexico and Assistant District Attorney uses the colors of her officer and position of trust to harass Petitioner and her family. *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

REASONS FOR GRANTING THE WRIT

The Interstate Compact which was first passed in 1937, which the states also recognize that congress, by enacting the Crime Control Act, U.S. Code 4 U.S.C. § 112 Compacts between States for cooperation in prevention of crime; consent of Congress has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime, and has provided the sole statutory authority for regulating the transfer of Adult Parolee and Probation supervision across state boundaries. As of June 19, 2002 the new Interstate Compact for Adult Offender Supervision became active by thirty-five (35) States passing State Statues, thus making this a **New Important Question of Federal Law** ***see 28 U.S.C. § 1331*** there is a Division of the opinions of the States, and the Courts are in conflict. Congressional consent transforms such a compact into federal law, U.S. Const., Art. I, § 10, Cl. 3 Congressional consent gives the Law impairing the obligation of a

contract, U.S. Const., Art. I, § 10, Cl. 1 . This Court has previously held "The Compact Clause of the United States Constitution, Art. I, § 10, cl. 3 , provides that "No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State . . ." Because congressional consent transforms an interstate compact within this Clause into a law of the United States, this Court held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question 28 U.S.C. § 1331 *Cuyler v. Adams*, 449 U.S. 433 (1981) This Court has also previously stated "The Constitution also prohibits States from entering into any "Treaty, Alliance, or Confederation" either with other States or with foreign governments. Art. I, § 10, cl. 1. The Interstate Compact Clause and the State Treaty ensure that whatever sovereignty a State possesses within its own sphere of authority ends at its political border." *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) see Parole & Probation Compact Administrators Association Manual Rules Chapter 3 (Appendix K) Commentary to Section 1-101 ("The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the

highest form of state statutory law, having precedence over conflicting state statues and obligating the member states to the provisions of the agreement as though it were a binding contract as well as a statue entered into by the member states.") Having entered into a contract, a participant state may not unilaterally change its terms."[1] This Court has made increasingly clear; Congress' power is constrained by both express and implied limitations in the Constitution's grants of power. These constraints can inhere "in the very language" of the grant itself. *Cameron v Mills,* 645 F. Supp. 1119,(S.D.Iowa 1986) (Interstate Corrections Compact) *Carchman v. Nash*, 473 U.S. 716 (1985) (Interstate Detainers); *Port Authority Trans-Hudson Corp. v. Feeney*, 495

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[1] See also Aveline, 728 A.2d at 1257 n.10 (found in McComb v. Wambaugh, 934 F.2d 474 (3rd Cir. 1991) observed that:
[c]ompacts have the characteristics of contracts because the enactment of the compact terms as part of an enabling statue by one state is viewed as an offer. The offer may be accepted through enactment of statues, including the same compact terms by another state. As with other contracts, the Contract Clause of the United States Constitution protects compacts from impairment by the states. This means that upon enacting a compact, it takes precedence over the subsequent statues of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide." (Internal citation omitted.)

U.S. 299 (1990) (Interstate Railway); *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982) (uniformity requirement in bankruptcy clause). They can be found in the express terms conditioning particular grants of constitutional power. Alternatively, they can flow from "presuppositions" that the Constitution "confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (11th Amendment). The question in this case is whether the Interstate Compact for Adult Offender Supervision for Parole & Probation is a new important question of Federal Law 28 *U.S.C. § 1331*. Each State that has enacted this Statue must comply with the wording drafted by the Counsel of State Government (CSG) and the National Institute of Corrections (NIC). Beginning in January 2000 the new Interstate Compact for Adult Offender Supervision saw acceptance in the states and by June 19, 2002 had reached its threshold of thirty-five (35) States, thereby becoming active in 30 months. The Interstate Compact for Adult Offender Supervision, in pertinent part, "Article I (A) states the compacting states also recognize that Congress, by enacting the crime control act, 4 United States Code section 112 (1965), has authorized and encouraged compacts for cooperative efforts and

mutual assistance in the prevention of crime." "Article III (A) initiate legal action… in the federal district where the interstate commission has its offices to enforce compliance with the provisions of the compact or its duly promulgated rules and bylaws, against any compacting state in default." For all the foregoing this is a Question of Federal Law *28 U.S.C. § 1331* Question of Federal Law *28 U.S.C. § 1331* which this Court has not previously entertained.

This Court should also grant review to resolve the confusion among the States both about the scope of Compact Clause and about the interaction between Congress' compact and contract power since Act of Congress expressly authorizes this and it is necessary to aid its jurisdiction.

The decision below conflicts with the State of New Jersey, State of Texas, State of Wisconsin, interpretation of Congress' compact and contract power, and reveals tensions with other states about the same power. The decision also conflicts with this Courts previous ruling with respects to Interstate Commerce Compacts. The State of New Mexico has ignored, misapplied, are contrary to, or involved an unreasonable application of, clearly established

Federal law, as determined by this Court, a **New Important Question of Federal Law** *see 28 U.S.C. § 1331* there is a Division of the opinions of the States, and the Courts are in conflict. Congressional consent transforms such a compact into federal law.

I. This Court Should Grant Certiorari To Resolve A Conflict in the States About Whether this is a question of important Federal Law, and if the States wave their rights to be sued and if Federal Law prevails over State Statue.

The Compact Clause gives Congress the power:

> "To consent for any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts"

U.S. Const., Art. I, § 10, Cl. 3 Congressional consent transforms such a compact into federal law. As this, Court has held:

> "Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. Where an agreement is not "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the

just supremacy of the United States," it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause. *Cuyler*, 449 U.S. at 440, 101 S.Ct. at 707."

Parole & Probation Compact Administrators Association Manual Rules Chapter 3 (Appendix K) which in pertinent part " No Parolee or Probationer under the Compact shall be denied the right to appeal to a court for the protection on individual rights." State of New Mexico presented with the question of Federal Law; the State of New Mexico denied Petitioner.

A. The Decision Below Conflicts With Authority Of This Court

As petitioner has argued, this Court has expressly held that where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an

appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause. *Cuyler,* 449 U.S. at 440, 101 S.Ct. at 707" Petitioner has argued, this Court has expressly stated

> *"Edelman v Jordan, 415 U.S. 651* (1974) cites: In *Ex Parte Young,* 209 U.S. 123, "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

The State of New Mexico Assistant District Attorney (Price) using the Colors of her Office *28 U.S.C. § 1343* (Civil rights) initiates a Motion to Revoke pursuant to New Mexico State Statues N.M.S.A. 31-21-14 Return of parole violator; N.M.S.A 31-21-15 Return of probation violator which are in direct conflict with Interstate Compact Adult Offender Supervision. These actions violate the United States Constitution and the fundamental rights of Petitioner. As this Court has previously stated in *West Virginia ex rel. Dyer v Sim,* 341 U.S. 11, 27-28, 17 s.Ct. 557,560, 95 L.Ed. 7`3 (1951) "Having entered into a contract, a participant state may not unilaterally change its terms. A compact also takes precedence over statutory law in member states." Thus being the case, the

State of New Mexico Assistant District Attorney (Price) cannot change the terms or conditions of the compact. State of New Mexico Assistant District Attorney (Price) using the Colors of her Office violated Fundamental Rights of Petitioner by initiating a Motion to Revoke Probation, see Parole & Probation Compact Administrators Association Manual Rules Chapter 3 (Appendix K) Probable Cause Hearings to Section 5-102 ("Morrissey v. Brewer and Gagnon v. Scarpelli) mandate the holding of preliminary probable cause hearings in the receiving state prior to returning an alleged violator to the sending state.") A hearing for an alleged parole or probation revocation would be in Arizona. New Mexico Interstate Compact Deputy Administrator presented testimony by Letter of October 30, 2001 (Appendix L-) that the State of New Mexico Assistant District Attorney (Price) initiated this proceeding not Parole or Probation, thus violating Due Process and fundamental rights guaranteed by Parole & Probation through Interstate Compact. The States of the United States by passing the Interstate Compact for Adult Offender Supervision wave their rights to sue and be sued, The States agree to the rules, and jurisdiction of the Interstate Commission. The States authority ends

at their political border. This Court should hear, since this has become a new important question of Federal Law *(28 U.S.C. § 1331)* State of New Mexico erred in Opinion below and is in conflict of the decisions and findings of the United State Supreme Court.

B. The Decision Below Conflicts with U.S. Const., Art. III, § 2, Cl. 1, & 2 Judicial Power of United States.

Petitioner has lived in Arizona since February 7, 2001. There are no charges pending from New Mexico; therefore, the Summons to appear cannot be heard in State Court of New Mexico. Article III, § 2, Cl. 1, & 2 states in pertinent part " The Judicial Power shall extend to all cases, in Law & Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -To Controversies between two or more States; --between a State and Citizens of another State."

Petitioner lives in Arizona, proper jurisdiction by the United States Constitution is Federal Court or the State of Arizona. There were no new charges filed against Petitioner. The State of New Mexico erred in their decision and resulted in a decision that was contrary

to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

C. The Decision Below Conflicts With The State of Wisconsin, State of New Jersey, and with other Compact States.

There are 46 other States which have passed the same identical Statue and must comply with the *Parole & Probation Compact Administrators Association Manual Rules Chapter 3 (Appendix K)* The State of New Jersey denied parole to a person and had to re-evaluate their position, Opinion from New Jersey Attorney General (Appendix M), David Samson by Assistant Attorney General Tamara Rudow dated July 9, 2002; regarding Interstate Compact and the PPCAA Manual, which explains application of the Compact . The decision below conflicts with the State of Wisconsin and the findings therein. State v Robinson, 2001 WI App 224, *247 Wis.2d 988e 635 N.W.2d 26 (Appendix N)(unpublished)* The decision below conflicts with *McComb v. Wambaugh*, 934 F.2d 474 (3rd Cir. 1991) . Which in pertinent part, "having entered into compact with another state, participant state may not unilaterally change its terms…under constitutional article

requiring consent of Congress as to any agreement or compact between states, congressional approval is necessary only when compact is directed to formation of any combination tending to increase political power in states which may encroach upon or interfere with supremacy of the United States. U.S.C.A. Const. Art. 1, §10, cl. 3."

The Interstate Commission for Adult Offender Supervision by-laws (Appendix O), in pertinent part, Article I, Section 2 "the promulgation of binding rules and operating procedures; oversight and coordination of offender transfer and supervision activities in Compacting States."

The Interstate Commission has supervision over Petitioner, not the State of New Mexico Assistant District Attorney (Price). By enacting the Interstate Compact for Adult Supervision, the State of New Mexico has agreed to abide and enforce the rules enacted by the Interstate Commission. The State of New Mexico has ignored or misapplied, are contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by this Court. The State of New Mexico erred in the opinion below.

II. This Court Should Grant Certiorari To Resolve Due Process Requirements in Conflict in the States About

The Interstate Compact and the Unreasonable application of clearly established Federal Law as Determined by this Court.

Petitioner has raised a Fourteenth Amendment challenge to Interstate Compact of Adult Offender Supervision. The States have a double task of Due Process while enforcing Federal Law. The Interstate Compact *Parole & Probation Compact Administrators Association Manual Rules Chapter 3 (Appendix K) Rule 5-102* states that any Probation Revocation will be held in the Receiving State with the requirements in Gagnon v. Scarpelli, 411 U.S. 778 and Morrissey v. Brewer, 408 U.S. 471 clearly established Federal law, as determined by the Supreme Court of the United States. The State of New Mexico's application of Interstate Compact of Adult Offender Supervision is clearly erroneous. It is also in direct conflict with the approach of the State of New Jersey, State of Wisconsin, and State of Texas and the Interstate Commission.

A. The State New Mexico of Has Mistakenly Overlooked The Reach Of This Court's Decision In Gagnon v. Scarpelli, 411 U.S. 778;Morrissey v. Brewer, 408 U.S. 471;and Gideon *v.* Wainwright, *372 U.S. 335* (1963) clearly established Federal law.

This Court has set the requirements for a probation or parole revocation should one occur. The Due Process requirements as required in Gagnon v. Scarpelli, 411 U.S. 778 and Morrissey v. Brewer, 408 U.S. 471, were not met. State of New Mexico Assistant District Attorney (Price) has used the colors of her office and clearly violated Federal Law and Fundamental rights of Petitioner. Interstate Compact takes precedence over State Statues. To appeal to a Court for protection of civil rights *Parole & Probation Compact Administrators Association Manual Rules Chapter 3 Rule 5-107 (Appendix K)* which in pertinent part "No Parolee or Probationer under the Compact shall be denied the right to appeal to a court for the protection on individual rights." Petitioner presented this to the State of New Mexico and it was denied. This is a new important Question of Federal Law, which this Court should decide.

These requirements in themselves serve as substantial protection against ill-considered revocation and are "minimum requirements of Due Process". There are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee has stakes in preserving these

differences. This Court also stated Gagnon v. Scarpelli, 411 U.S. 778 and Morrissey v. Brewer, 408 U.S. 471,

> "In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a Petitioner enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a Petitioner must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole."

Since the minimum Due Process, requirements as set forth by this Court have not been met, and the proceedings in State Court involve Due Process violations. Counsel should be appointed. Petitioner Motioned for Appointment of Counsel. State of New Mexico Courts refused counsel. A Motion to revoke had been filed, even though Due Process had not been met, therefore counsel

should be appointed. Just because a person can make a motion does not mean they have the skills needed to make a legal brief or argument. Liberty interests as well as Constitutional rights of Petitioner were in question. Just the skill to make a motion does not make the skills to argue said motion and support thereof. If counsel were appointed the fundamental rights of petitioner would be protected. Petitioner was granted In Forma Pauperis in State proceedings and does not have the necessary skill and training to represent herself. Petitioner didn't comprehend how the State of New Mexico Assistant District Attorney (Price) committed these actions, since she was not Parole and Probation and the State of Arizona was allowed to set the terms and conditions of *Parole & Probation Compact Administrators Association Manual Rules Chapter 3 Rule 2-110,* (Appendix K) and Arizona had not filed any probation or parole action.

Powell *v.* Alabama *287 U.S. 45* (1932) Counsel should be appointed to protect against ill-considered revocation which occurred and that the "minimum requirements" of Due Process were met. *Scarpelli* states that access to counsel is a presumptive right only. Under *Scarpelli*, it is also clear that the presumptive

right to counsel applies to both the preliminary and the final revocation hearings. The decision is too made on a case-by-case basis in the exercise of sound discretion and on the guidelines set forth in *Scarpelli.* In other words, if the state permits counsel to participate at parole revocation hearings, it should provide counsel at state expense for those who cannot afford representation. The need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Gagnon v. Scarpelli, 411 U.S. 778. The State of New Mexico erred in their decision and resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

III. This Court Should Grant Certiorari To Resolve A Conflict in the States About Whether The State of New Mexico Assistant District Attorney Commits Prosecutorial Misconduct/Vindictiveness.

An Attorney has a Code of Professional Conduct to uphold. The ABA Standards for Attorneys applies to all Attorneys; however, the ABA Standards for Prosecutors applies to prosecuting

attorneys as well. The State of New Mexico Assistant District Attorney violates the ABA Standards, which are included in the State of New Mexico Statues. These State Statues are controlling fundamental rights in any Court.

A. A prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the Petitioner's right to a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment

Petitioner motioned for evidence pre-trial and post conviction proceedings. In Court proceedings, Defense Counsel informs the Court that disclosure had not been given, and that the State of New Mexico Assistant District Attorney refused to provide discovery. (Transcript of July 1, 1999 – Appendix I). This Court has stated in *United States* v. *Agurs*, 427 U.S. 97, 109 (1976); "the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." The State of New Mexico Assistant District Attorney clearly refused to provide any disclosure. The State of New Mexico District Court failed to protect fundamental rights of Petitioner. When the evidence was requested and refused by State of New Mexico Assistant District

Attorney. *Brady* v. *Maryland*, 373 U.S. 83 (1963) this Court has stated "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." When evidence is deliberately withheld by the State of New Mexico, constitutional error has been committed.

B. Whenever any Attorney is aware of perjury, they have a fundamental responsibility to correct the error.

The State of New Mexico was informed in the Judges Chambers on the record of the perjured testimony of their Witness, Petitioner had a witness to rebut the perjury, however, the State refused *Napue v Illinois*, 360 U. S. 264 (1959). In *Pyle* v. *Kansas*, 317 U.S. 213, 215-216, this Court phrased the rule in broader terms. The perjury of the States Witness should be rebutted and testimony allowed. Denial of favorable witnesses for perjury rebuttal or testimony of defense witness is a fundamental right. The State of New Mexico erred in the opinion below.

C. Double Jeopardy Clause "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Fifth Amendment guarantee against

double jeopardy is enforceable against the States through the Fourteenth Amendment

In the Motion to revoke hearing, November 13, 2001 (Appendix J) Petitioner notified the State of New Mexico District Court that the New Mexico Court of Appeals Case # 21,129, mandate from November 17, 2000 (Appendix D) have not been complied with, placing Petitioner in Double Jeopardy. The State of New Mexico and The State of New Mexico Assistant District Attorney commits perjury in Court stating Count III have been dismissed (Transcript of November 13, 2001 (Appendix J) and the mandate of the New Mexico Court of Appeals had been abided by. No order had been entered, complying with mandate. The conviction is added to an Order of Probation on November 15, 2001. Petitioner remains in Double Jeopardy from the Perjury of the State of New Mexico Assistant District Attorney, and the State of New Mexico Eleventh Judicial District Court. In *Benton* v. *Maryland*, 395 U.S. 784, the Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary

system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). As a result of the mandate from the New Mexico Court of Appeals not being complied with Double Jeopardy was placed upon Petitioner by the State of New Mexico by the Order of Probation (Appendix F). In *Hughey v. United States*, 495 U.S. 411 The United States Supreme Court has previously stated that the language and structure of the [VWPA] make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." The Order of Probation (Appendix F) adds a promissory note, and informing employers of conviction, but the Judgment & Sentence (Appendix G) do not state as a condition of the suspended sentence. Order of Probation is turning a criminal conviction into a civil judgment, which violates due process.

D. Subpoena Duces Tecum, when used as a search warrant with out Due Process violates Fourth Amendment.

The State of New Mexico Assistant District Attorney has used Subpoena Duces Tecum (Appendix P) as search warrants. Due Process mandates service upon all parties. The State of New Mexico Assistant District Attorney has issued without service upon all parties as required, obtaining records (illegal search & seizure) and then uses, the evidence obtained to build the States case against Petitioners, without due process of law, violating fundamental rights of petitioner, and perpetrating a fraud upon the parties that were served the subpoena duces tecum. Federal Rule 17 of Criminal Procedure & Federal Rule 30 of Civil Procedure clearly states how they are to be served. The American Bar Association Standards (ABA), Prosecution Function and Defense Function 3rd Ed. ©1993, Standard 3-3.1 Investigative Function of Prosecutor c) A prosecutor should not knowingly use illegal means to obtain evidence or to employ or instruct or encourage others to use such means. (e) A prosecutor should not secure the attendance of persons for interviews by use of any communication, which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so. The State of

New Mexico has encompassed in the State Statues the ABA Standards. Issuing Subpoena Duces Tecum was served upon unknowing parties who produced evidence without due process of law. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385. The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.

The Parole & Probation can do search and seizures as a condition of Parole or Probation without waving the Fourth Amendment. This is not the case at hand. The State of New Mexico Assistant District Attorney violated the Due Process guarantee and fundamental rights of Petitioner, in pre-trial and post conviction proceedings.

The State of New Mexico erred in their decision and resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

E. Right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. A speedy trial is guaranteed

the accused by the Sixth Amendment to the Constitution

Petitioner asserted the right to a Speedy Trial. The United States Supreme Court has previously established that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. Barker v. Wingo, 407 U.S. 514. The State of New Mexico Assistant District Attorney (Price) files an extension to try Petitioner with the Supreme Court for the State of New Mexico. The State of New Mexico Assistant District Attorney (Price) deprives Petitioner of the fundamental rights to a Speedy Trial by committing perjury in her filing to the Supreme Court for the State of New Mexico. The State of New Mexico erred in their decision and resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

CONCLUSION

For the forgoing reasons, petitioner prays that this Court would grant review in this case to reverse the holding of the Supreme Court for the State of New Mexico due to the new important

question of Federal Law *(28 U.S.C. § 1331)*; to settle the conflict between the states: and the fundamental rights guaranteed by the Constitution of the United States, which have precedence over a conflicting state statue. Petitioner also requests such other and further relief as this Court deems just and proper.

Respectfully submitted,

By: _____

Cheri Smith
P O Box 10877
Tempe, AZ 85284-0015
480-710-0947

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
November 4, 2003

NO. 28,256

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

CHERI SMITH,

Defendant-Petitioner.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for reconsideration, and the Court having considered said motion, brief in support and motion for appointment o counsel, and being sufficiently advised, (ef Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chavez concurring;

Appendix A

NOW, THEREFORE, IT IS ORDERED that the motion hereby is DENIED.

IT IS SO ORDERED

ATTEST: A TRUE COPY

Clerk of the Supreme Court of the State of Now Mexico
(SEAL)

Madeline Garcia

WITNESS, The Hon. Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of November, 2003.

Madeline Garcia

Madeline Garcia,
Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF NEW MEXICO

State of New Mexico **Plaintiff-Respondent,** **vs.** **Cheri Smith,** **Defendant-Petitioner,**	**S. Ct. No.28,256** **San Juan County State District Court** **Case CR98-00935-1** **Honorable Wm Birdsall** **Court of Appeals Docket 23,725**

MOTION FOR RECONSIDERATION

OF

PETITION FOR WRIT OF CERTIORARI

CHERI SMITH
Defendant, Pro Se
P O Box 10877
Tempe, AZ 85284

Appendix B

MOTION FOR RECONSIDERATION
OF
PETITION FOR WRIT OF CERTIORARI

COME NOW Cheri Smith, Defendant-Petitioner, pro se and files this Motion for Reconsideration of Petition for Writ of Certiorari pursuant to Rule 12-404 (A) NMRA 2003. The Motion for Reconsideration of Writ of Certiorari is timely filed if within fifteen (15) days of the Courts Disposition. Order denying the Writ of Certiorari was denied October 3, 2003, envelope metered & mailed October 6, 2003 to Defendant, thus the reconsideration is timely if filed on or before October 21, 2003.

DIRECT CONFLICTS WITH THE UNITED STATES SUPREME COURT

1. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law already decided by the United States Supreme Court. The United States Supreme Court has previously stated that Due Process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in *Morrissey* v. *Brewer,* 408 U.S. 471, in the case of a parolee. Any

revocation hearing would be held in the receiving state of a parole or probation that transferred through Interstate Compact Adult Offender Supervision, which is a question of Federal Law. CUYLER v. ADAMS, 449 U.S. 433 (1981) The State District Attorney filed Motion Revoke and amended three more times violating due process, and Interstate Compact Adult Offender Supervision Statue.

2. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law already decided by the United States Supreme Court. The United States Supreme Court has previously stated that "Collateral Estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Double Jeopardy has been placed upon Defendant violating due process. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) Ex Parte Nielsen, 131 U.S. 176

3. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law

already decided by the United States Supreme Court. United States v. Keen, 509 F.2d 1273 (6th Cir. 1975) The United States Supreme Court has previously stated that subpoena *ad testificandum* or a subpoena *duces tecum* to be issued only for the purpose of compelling the attendance of witnesses or the production of evidence at a formal proceeding. Only in the case of a subpoena *duces tecum* may the court direct that the evidence subpoenaed be produced for inspection before trial or before it is to be offered in evidence. The State District Attorney (Price) issued Subpoena Duces Tecum prior to trial, and post-conviction, building the case from what she obtained, and without due process of law upon all parties, thus committing fraud and illegal search and seizure.

4. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law already decided by the United States Supreme Court. The United States Supreme Court has previously stated that Edelman v. Jordan, 415 U.S. 651 (1974) cites: In Ex Parte Young, 209 U.S. 123. The Eleventh Judicial District Court and the State District Attorney (Price) does not have subject matter jurisdiction. State District Attorney violated Due Process and fundamental rights when she initiated a Motion to revoke probation, while Defendant

was on parole, sentence being consecutive. A State District Attorney should be held to a higher standard than other attorneys. District Attorney has an obligation to disclose, to protect the fundamental rights of defendants, to uphold the integrity of the Courts, and the Attorney's Code of Conduct. State District Attorney (Price) commits Perjury, Deceit, Fraud, Withholding Evidence, Illegal Search and Seizures, violating due process all violate the Attorneys Code of Conduct, as well as the constitutional rights of a defendant, pretrial & post-conviction proceedings, which is supported by the record. Prosecutorial misconduct and malicious abuse of process has been committed by the State District Attorney (Price). As a result of the State District Attorney's actions Defendant has been wrongly convicted.

5. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law already decided by the United States Supreme Court. In United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); *United States* v. *Agurs*, 427 U.S. 97, 109 (1976); *Brady* v.*Maryland*, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264, 269 (1959). The Sixth Amendment guarantees a criminal defendant "compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

Perjured Testimony and favorable witnesses must be heard other wise due process and fundamental error occurs. The Defendant was wrongly convicted since she was not able to present her witnesses, who had been listed. The defendant was also not able to rebut the perjured testimony of the State's Witnesses. The State knew the testimony to perjured, which is supported by the record.

6. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law already decided by the United States Supreme Court. Barker v. Wingo, 407 U.S. 514 The United States Supreme Court has previously established that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. The Deceit of the State District Attorney (Price) deprives Defendant of the Speedy Trial.

7. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law already decided by the United States Supreme Court. *Hughey v. United States,* 495 U.S. 411 The United States Supreme Court has previously stated that the language and structure of the [VWPA] make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of

the offense of conviction." The Order of Probation adds a promissory note, and informing employers of conviction, but the judgment & sentence do not state as a condition of the suspended sentence. Order of Probation is turning a criminal conviction into a civil judgment which violates due process.

8. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law already decided by the United States Supreme Court. NMSA Section 31-11-1(A) Stays the Execution of a Sentence While the Underlying Conviction is on Appeal. The right to appeal is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. The State violated due process when Defendant asserted her right to appeal and a warrant was issued.

9. The Decision of the Supreme Court and the Court of Appeals for the State of New Mexico are in direct conflict with case law already decided by the United States Supreme Court. Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972; *Powell* v. *Alabama*, 287 U.S. 45(1932), The United States Supreme Court has previously stated that "fundamental principles of liberty and justice which lie at the

BEST AVAILABLE COPY

base of all our civil and political institutions," Counsel should be appointed when it involves due process, the State was represented by State District Attorney (Price). In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. **In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer** with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases. This was not a probation revocation; it was a hearing initiated by the State District Attorney (Price), violating due process. Counsel should have been appointed to protect due process and the rights of the Defendant.

8. A significant question of law is involved. The State of New Mexico passed NMSA 31-5-20, Interstate Compact Adult Offender upervision on April 15, 2001, which passed the required (35) thirty-five states needed to make it active a question of federal law by June 2002. The procedure is clearly established and rules are in place.

9. The Petition involves an issue of substantial public interest that should be determined by the Supreme Court. Is the Supreme Court for the State of New Mexico, telling the citizens of New Mexico that there are double standards for civil rights, and only a State District Attorney (Price) is above review of her deceit, fraud, due process violations, interference in federal law, and Attorney Code of Conduct. The Record supports these facts. The Supreme Court for the State of New Mexico is the only judicial department that can review an Attorney's Conduct, and are responsible by respondent superior. The Supreme Court for the State of New Mexico has been presented with numerous civil rights violations of Defendant, which are supported by the record.

10. Defendant has not contacted opposing counsel since this is a question of law.

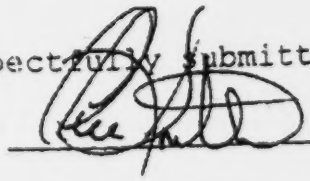
CONCLUSION

One would wonder why the State Supreme Court would not hear so many clearly established questions of Federal Law. The only conclusion is that the State of New Mexico is protecting the State District Attorney (Price). The State of New Mexico District Attorney (Price) has clearly violated numerous Constitutional Rights of Defendant, the State of New Mexico Attorney Code of Conduct, and Due Process. The only conclusion that can be drawn is that the State is protecting the State District Attorney (Price) so that the State of New Mexico will not have to review the State District Attorney's cases. This in itself is a travesty to justice, not to mention making a mockery of The Constitution of the United States. This Court has been informed, the Court Record supports the deceit and fraud committed upon it, the Court still does not hear the Petition for Writ of Certiorari. The State District Attorney (Price) interferes in Federal Law by initiating a Probation Revocation, which involves Interstate Compact without due process of law. The Defendant renews her prayer that this Court would hold a hearing with respects to the State District Attorney's (Price) action of extrinsic fraud upon this Court, violation of due

process and constitutional rights of defendant, since a crime has been committed by the State District Attorney (Price) which is supported by the record. Defendant would also pray for any other relief that this Court deems just and proper.

WHEREFORE, Defendant, CHERI SMITH respectfully requests that this Court grant The Motion for Reconsideration of Petition For Writ of Certiorari, & Petition for Writ of Certiorari for any and all the foregoing reasons including but not limited to the dismissal of all charges and reverse all convictions as a result of the Double Jeopardy that has been placed upon defendant, defendant being wrongly convicted and due process violations of the State and not to remand to The New Mexico Court of Appeals since all issues have previously been raised, and the decisions thereof are contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Respectfully submitted,

By: 

Cheri Smith
P O Box 10877
Tempe, AZ 85284-0015

CERTIFICATE OF SERVICE

I Cheri Smith, hereby certify that on October 20, 2003 a true and correct copy of the foregoing Motion for Reconsideration of Petition for Writ of Certiorari was Mailed to the following:

Appellate Division Attorney General
P O Box 1508
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INTERESTED PARTIES

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Respectfully submitted,

By: _____

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IN THE SUPREME COURT
STATE OF NEW MEXICO

State of New Mexico **Plaintiff-Respondent,** **vs.** **Cheri Smith,** **Defendant-Petitioner,**	**S. Ct. No.28,256** **San Juan County State District Court** **Case CR98-00935-1** **Honorable Wm Birdsall** **Court of Appeals Docket 23,725**

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

OF

PETITION FOR WRIT OF CERTIORARI

CHERI SMITH
Defendant, Pro Se
P O Box 10877
Tempe, AZ 85284

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

COME NOW Cheri Smith, Defendant-Petitioner, pro se and files this Brief in Support of Motion for Reconsideration of Petition for Writ of Certiorari.

The United States Supreme Court has stated that Interstate Compact is a question of Federal Law. CUYLER v. ADAMS, 449 U.S. 433 (1981). The Interstate Compact for Adult Offender Supervision NMSA 31-5-20 was passed by the State of New Mexico on April 15, 2001. Thirty-Five (35) States have passed by June 2002, thus making this a question of Federal Law. See Parole & Probation Compact Administrators Association Manual Rules Chapter 3 Commentary to Section 1-101 ("The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statues and obligating the member states to the provisions of the agreement as though it were a binding contract as well as a statue entered into by the member

states.") Having entered into a contract, a participant state may not unilaterally change its terms."[1] A State of New Mexico District Attorney (Price) filed for a revoca[illegible]n of probation against Cheri Smith on September 28, 2001 which continues for sixteen (16) months and nine (9) hearings, which the Defendant attended until January 14, 2003 at which time a warrant was issued, after Defendant filed notice of appeal, violating due process Constitution of the United States [illegible]mendment IV, V, & XIV; Constitution of the State of New Mexico Article II, §10, §14, & §18; Constitution of the State of Arizona Article II § 4, § 24. New Mexico Correction Depart Policy CD 053001, Adult Interstate

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[1] See also Aveline, 728 A.2d at 1257 n.10 (found in McCOMB v. WAMBAUGH, 934 F.2d 474 (3rd Cir. 1991)) observed that:

[c]ompacts have the characteristics of contracts because the enactment of the compact terms as part of an enabling statue by one state is viewed as an offer. The offer may be accepted through enactment of statues, including the same compact terms by another state. As with other contracts, the Contract [illegible]ause of [illegible]e United States Constitution [illegible]otects [illegible]pacts from impairment by the states. This means [illegible]hat upon enacting a compact, it takes precedence over the subsequent statues of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide." (Internal citation omitted.)

Compact, states, "In the case of a New Mexico probationer to be transferred to, or who is already residing in another state, correspondence should not be conducted directly with local Probation Officer who is supervising the case. Rather, correspondence will be maintained only with the Compact Administrator of the State through the Interstate Compact Administrator (ICA). When a Probation Parole Officer from another state writes directly to one of our district offices, a copy should be routed to Central Office, Probation and Parole Division, through the Region Office. The ICA will inform the other state's probation office to channel their correspondence through their compact administrator." There have not been any probation revocation actions filed by Arizona. Due Process requirements are found in MORRISSEY v. BREWER, 408 U.S. 471 (1972), GAGNON v. SCARPELLI, 411 U.S. 778 (1973) see Parole & Probation Compact Administrators Association Manual Rules Chapter 3 Probable Cause Hearings to Section 5-102 ("Morrissey v. Brewer and Gagnon v. Scarpelli mandate the holding of preliminary probable cause hearings in the receiving state prior to returning an alleged violator to the sending state.") A hearing for an alleged violation would be held in Arizona, if one had occurred.

New Mexico Interstate Compact Deputy Administrator Celeste Cassias has given documented testimony by Letter of October 5, 2001 that the State District Attorney did this not Parole or Probation, thus violating due process guaranteed by Parole & Probation through Interstate Compact. The State District Attorney (Price) by her actions are denying the Defendant equal protection of the law, and filed a motion to revoke probation without due process of law. Lasley v Baca, 95 N.M. 791 (1981), 626 P.2d 1288 which states "Attack on subject matter jurisdiction may be made at any time in proceedings, including for the first time on appeal". Trujillo v. Serrano, 117 N.M. 273, 871 P.2d 369, (N.M. 1994) which states: "Lack of subject matter jurisdiction precludes possibility of hearing case." Defendant paroled to Arizona with probation transferred, jurisdiction lies in Arizona for any hearing. State District Attorney (Price) violated due process. Interstate Compact for Adult Offender Supervision NMSA 31-5-20, the State of New Mexico waves their rights to be sued. That means that even the **chief justice or chief judicial officer of the State of New Mexico, can be sued.** The Defendant has asserted her Constitutional rights and will continue to do so, however, the State of New Mexico by passing this Statue has made this a

question of Federal Law, and therefore waves their rights to suit. The Defendant has lived in Arizona since February 7, 2001. A State District Attorney (Price) crossed the state lines for her personal gain, and gratification to persecute the defendant, using a malicious abuse of process DeVaney v. Thriftway Marketing Corp., 1998-NMSC-001, 124 N.M. 512 953 P.2d 277; Weststar Mortgage Corp v. Jackson, 2002-NMCA-009, 131 N.M. 493 39 P.3d 710, To sustain an action for malicious abuse of process, "there must be both a misuse of the power of the judiciary by a litigant and a malicious motive." By the State District Attorney (Price) has violated fundamental rights of Defendant. The Interstate Compact affords more rights to Defendant, which the State has chosen to ignore. See The Interstate Compact Book For Supervision of Paroles & Probationers Rule 5-110 States "Right of Parolees and Probationers to Legal Proceedings. No Parolee or probationer under the Compact shall be denied the right to appeal to a court for the protection of individual rights." No Judgment and Sentence no orders, just an appeal to protect the rights of Defendant. The Court of Appeal and Supreme Court for the State of New Mexico are clearing ignoring the Statues, Constitution of the United States and State of New Mexico that they have sworn to

uphold. When the Interstate Compact for Adult Offender Supervision passed the (35) thirty-five states, the rules and regulations were already in effect. The New Mexico Interstate Compact Assistant Administrator has documented testimony that this was the State District Attorney (Price) initiation of this, not the Interstate Compact Commission or Parole & Probation for the State of New Mexico.

The Compact also requires that the Interstate Commission be notified of proceedings with regards to the revocation of a parole or probation. There has not been any notification to the Interstate Commission for Adult Offender Supervision.

The State District Attorney (Price) cannot do what she has done, and the State may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide, the Interstate Compact for Adult Offender Supervision **DOES NOT** so provide. The Supreme Court of the United States has so stated. The Interstate Compact for Adult Offender Supervision NMSA 31-5-20, makes this binding upon the State of New Mexico, as well as all other (46) states that have passed. The wording is uniform in each statue.

The Motion to Revoke has been ongoing since September 28, 2001, almost two years, and the State continues to ignore the question of Due Process. The Interstate Compact has been in existence since 1937, however, is now uniform in each state making this a question of Federal Law as of June 2002. Defendant has raised eight (8) other issues to this Court that are just as valid as the Interstate Compact, all having been heard and ruled by the United States Supreme Court. The issues do not need to be briefed since this Court has previously ruled on all issues, and being fully advised each time found in the Defendant's favor.

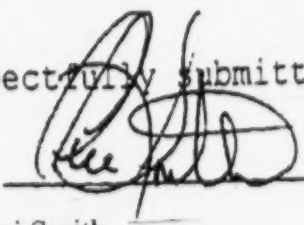
CONCLUSION

The Defendant renews her prayer that this Court would hold a hearing with respects to the State District Attorney's (Price) action of extrinsic fraud upon this Court, violation of due process and constitutional rights of defendant, since a crime has been committed by the State District Attorney (Price) which is supported by the record. Defendant would also pray for any other relief that this Court deems just and proper.

WHEREFORE, Defendant, CHERI SMITH respectfully requests that this Court grant The Motion for Reconsideration of

Petition For Writ of Certiorari, & Petition for Writ of Certiorari for any and all the foregoing reasons including but not limited to the dismissal of all charges and reverse all convictions as a result of the Double Jeopardy that has been placed upon defendant, defendant being wrongly convicted and due process violations of the State and not to remand to The New Mexico Court of Appeals since all issues have previously been raised, and the decisions thereof are contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Respectfully submitted,

By: 

Cheri Smith
P O Box 10877
Tempe, AZ 85284-0015

CERTIFICATE OF SERVICE

I Cheri Smith, hereby certify that on October 20, 2003 a true and correct copy of the foregoing Brief in Support of Motion for Reconsideration of Petition for Writ of Certiorari was Mailed to the following:

Appellate Division Attorney General
P O Box 1508
Santa Fe, NM 87501
Facsimile 505-827- 5826
Telephone 505-827- 6000

INTERESTED PARTIES

Don LaFratta
PPCAA
Massachusetts Parole Board
45 Hospital Road, Bldg B3
Medfield, MA 02052

Don Blackburn
Executive Director
Interstate Commission for Adult Offender Supervision
2760 Research Park Dr.
P.O. Box 11910

Respectfully submitted,

By: _____

Cheri Smith
P.O. Box 10877
Tempe, AZ 8528015
crsmith82@yahoo.com

THE SUPREME COURT OF THE STATE OF NEW MEXICO

October 3, 2003

NO, 28,256
STATE OF NEW MEXICO, Plaintiff-Respondent, vs.

CHERI SMITH, Defendant-Petitioner.

ORDER

This matter coming on for consideration by the court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard Ch Bosson, and Justice Edward L. Chavez concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeal number 23725. IT *IS SO* ORDERED.

Appendix C

ATTEST: A TRUE COPY

Madeline Garcia

Clerk of the Supreme Court
of the State Of New Mexico

(SEAL)

WITNESS, The Hon. Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 3rd day of October, 2003,

Madeline Garcia

Madeline Garcia

Chief Deputy Clerk

IN THE COURT OF APPEALS OF

THE STATE OF NEW

MEXICO STATE OF NEW MEXICO,

Plaintiff Appellee,

vs.

CHERI SMITH,

Defendant Appellant.

No.21,1 9

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
WILLIAM C. BIRDSALL, DISTRICT .JUDGE

PATRICIA A. MADRID, Attorney General
ANTHONY TUPLER, Assistant Attorney General
Santa Fe, New Mexico

Attorney for Plaintiff-Appellee
Todd Whittens

Frechette & Associates, P.C. Albuquerque, New Mexico

BILL T. TINKER
Albuquerque, New Mexico

Attorneys for Defendant-Appellant

MEMORANDUM OPINION

BOSSON, Judge.

Appendix D

Defendant was convicted, after a jury trial, of one count of embezzlement, one count of fraud, and one count of acting as an insurance consultant without a license while her license was suspended. (R.P. 183) Defendant raised six issues on appeal: (1) whether Defendant should have been charged under the Insurance Code with "larceny by embezzlement," a misdemeanor, instead of under the criminal code with embezzlement and fraud, third-degree felonies; (2) whether the filing of a criminal complaint containing additional charges, following the dismissal of an indictment, violated the due process and double jeopardy provisions of the United Statos-and New Mexico Constitutions; (3) whether the offenses prosecuted under the Insurance Code were petty misdemeanors and therefore barred by a one-year statute of limitations; (4) whether there was sufficient evidence of fraud to support Defendant's conviction for fraud; (5) whether the trial court erred in granting the State's motion to quash Defendant's subpoena of Victim's certified public accountant; and (6) whether there was sufficient evidence to support convictions for any alleged violations of the Insurance Code.

Our calendar notice proposed to affirm on all issues

except issue 3. Defendant and the State have each filed a memorandum in opposition to our proposed disposition. Unpersuaded by the arguments in the parties' memoranda, we affirm the trial court on all issues except issue 3. On issue 3, we reverse the trial court and remand for vacation of the conviction of acting as an insurance consultant without a license.

ISSUE 1

Defendant was convicted of embezzl nt over $2,500, a third degree felony under the Criminal Code. See NMSP.1978, § 30-16-8 (1963). Defendant argued in her docketing statement that under the general/specific statute rule, the State should have prosecuted her under the Insurance Code for misdemeanors rather than for felonies under the Criminal Code. Under the general/specific rule, "if two statutes, one general and one special, punish the same ... conduct, the special law operates as an exception to the general law, to the extent of compelling the state to prosecute under the special law." State v. Cleve, 1999-NMSC-017, J 17, 127 N.M. 240, 980 P.2d 23.

The Insurance Code states that a person who receives fiends in the capacity of an insurance solicitor and diverts or appropriates those funds with the intent to embezzle and without

the consent of the person entitled to those funds is guilty of larceny by embezzlement. See NMSA 1978, §

59A-12-22(A)(1984). Under NTMSA1978,§59A-1-17(A)(1984),the provisions of the Insurance Code "shall prevail over provisions relating to insurance in general or to such matter in general." Section 59A-1-17(A) also states that every violation of the Insurance Code is a petty misdemeanor unless it is "defined as a felony under any other law of this state or punishment there for classifies it otherwise." In our calendar notice, we proposed to hold that the felony charge of embezzlement under the Criminal Code was not preempted by a misdemeanor charge under the Insurance Code. (C.N. 3-4) We e stated that the overall statutory scheme of the Insurance Code does not demonstrate a legislative intent to preempt the application of the Criminal Code because the Insurance Code specifically permits the prosecution of felonies "under any other law of this state." Section 59A-117(A). Moreover, Section 59A-1-17(E) provides that penalties under the Insurance Code are in addition to any other penalty provided by law.

In her memorandum in opposition to our proposed disposition, Defendant repeats arguments from the docketing

statement, but also states that the embezzlement statute in the Criminal Code conflicts with the definition of larceny by embezzlement in the Insurance Code because the latter states that funds received by a person licensed or acting as an insurance agent are received in a fiduciary capacity whereas the criminal statute does not refer to a fiduciary duty but only to things of value which have been entrusted to the embezzler. (ISO 5) We are not persuaded by this argument. A fiduciary duty arises in a variety of contexts from a relationship based on "trust and confidence." See Moodv v. Stribling, 1999-NMCA-094, ¶¶ 17-18, 127 N.M. 630, 985 P.-1d 1210. Such a relationship has been defined as existing "'in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of one reposing the confidence.'" .Allsup's Convenience Stores, Inc. v. North River Ins. Co., 1999-NMSC-002, ¶ 37,127 N.M. 1, 976 P.2d I (quoting State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 131 n.9, 812 P.2d 777, 785, n.9 (1991)). The statement in the Insurance Code, therefore, that funds received by one who is or is acting as an insurance agent are received in a fiduciary capacity creates a presumption of entrustment for the purposes of

embezzlement. Thus, we hold there is no conflict between the criminal statute and the insurance statute in this case and that the felony charge of embezzlement under the Criminal Code was not preempted by a misdemeanor charge under the Insurance Code.

ISSUE 2

Defendant argued in her docketing statement that the State's filing of a criminal complaint containing additional violations of the Insurance Code, following the district court's dismissai, before trial, of charges contained in the first indictment, constituted prosecutorial vindictiveness and violated double jeopardy. (DS 6) In our calendar notice, we proposed to hold that Defendant's double jeopardy rights were not violated because the acts charged in the criminal complaint occurred on separate dates from the dismissed charges in the indictment. (CN 5) Defendant has not responded to our proposed disposition of the double jeopardy issue; therefore, we affirm on this issue. See State v. Martinez, 97 N.M. 585, 586, 642 P.2d 188, 189 (Ct. App. 1982) (stating that when a case is decided on the summary calendar, an issue is deemed abandoned when a party fails to respond to the calendar notice's proposed disposition of the issue). We also stated that we could not say that the prosecutor was either actually vindictive or

reasonably likely to have acted vindictively in bringing additional misdemeanor charges supported by evidence gained during discovery. (C.N. 6) Therefore, we proposed to hold that Defendant had not made a proper showing to the trial court of a reasonable likelihood of vindictiveness. (Id.)

In her memorandum in opposition to our proposed disposition, Defendant continues to argue that the prosecutor demonstrated a punitive animus toward her by bringing additional charges simply because Defendant exercised a legal right in moving to dismiss charges in the first indictment. (UO 7-9) The issue of prosecutorial vindictiveness is "normally subject to de novo review," but we apply a substantial evidence standard to the factual findings underlying a determination of prosecutorial vindictiveness. State v. Brule, 1999 NMSC-026, ¶ 6, 127 N.M. 368, 981 P.2d 782.

In order to raise a presumption of pretrial vindictiveness teat the prosecution must rebut with objective reasons, "'the defendant must show either: (1) actual vindictiveness or (2) a reasonable likelihood of vindictiveness.'" Brule, 1999-NMSC-026, ¶ 10 (quoting United States v. Contreras,108 F.3d 1255, 1262 (10' Cir. 1997)). If the defendant makes a prima facie case, the

prosecution must justify its decision to prosecute with "legitimate, articulable, objective reasons. '" Id. In State v. Stevens, 96 N.M. 627, 630, 633 P.2d 1225, 1231 (1981), our Supreme Court held ,that a prosecutor's decision to re-indict a defendant on more serious charges after the dismissal of two previous indictments did not create a presumption of vindictiveness that the prosecutor was required to rebut. The Court pointed out that "many actions taken by a prosecutor prior to conviction might appear vindictive yet are required by our system of criminal justice" and that if prosecutors were required to justify pretrial actions, they "might feel compelled to press the severest charges possible at the outset, to the detriment of defendants." Id.

In this case, Defendant informs us that when the trial court dismissed several misdemeanor charges, the prosecutor indicated that she would be adding additional charges. (MIO 8) Defendant argues that the addition of these charges is evidence of a vindictive motive because the prosecutor only charged Defendant after she had exercised her legal right to move to dismiss the other charges. (Id.) We disagree. In this case, Defendant acknowledges that the prosecutor did not initially charge Defendant with the subsequently added charges because, using her discretion, she did not want to

overcharge Defendant. (M.I. O.7) Once the charges in the first indictment were dismissed, it appears that the prosecutor, acting within her discretion, brought additional charges, which there was evidence to support, because to do so no longer seemed unreasonable.

Thus, we hold that Defendant did not show that the prosecutor's pretrial actions in this case demonstrated either actual or a reasonable likelihood of prosecutorial vindictiveness.

ISSUE 3

In her docketing statement, Defendant argued that the charge of acting as an insurance consultant without a license, as defined in NMSA 1978, § 59A-11A-8 (1989), was a petty misdemeanor subject to a one-year statute of limitations. As we stated in our notice, the interpretation of a statute is a question of law that we review de novo. See State v. Rael, 1999NMCA-068, ¶ 5, 127 N.M. 347, 981 P.2d 280. In our calendar notice, we proposed to agree with Defendant and reverse on this issue. We reasoned that under Section 59A-1-18(A), [u]nless the same is defined as a felony under any other law of this state or punishment therefor classifies it otherwise, every violation of the Insurance

Code [this chapter, except Articles 16A, 23A, 23B, 24A and Section 59A-33-14 NMSA 1978] is a petty misdemeanor punishable by a fine not to exceed five hundred dollars.

We explained that acting as an insurance consultant without a license, is not defined in Section 59A1 IA-8 as a felony. Moreover, its punishment, "a fine of not more than five hundred dollars (8500) or by imprisonment in the county jail for a definite term not exceeding six months or both" is consistent with the punishment for petty misdemeanors set out in NMSA 1978, § 31-19-1(B) (1984) (authorizing sentence for a petty misdemeanor as not to exceed six months or fine of not more than five hundred dollars or both).

The State seeks to persuade us that a petty misdemeanor under the Insurance Code is defined differently from any other misdemeanor. The State argues that under NMSA 1978, § 59A1-18(A) (1989), the maximum penalty for an Insurance Code petty misdemeanor is a $500 fine, and thus because Section 59A-l IA-8 also authorizes six months in the county jail for acting as an insurance consultant without a license, the offense cannot be a petty misdemeanor. (MIO 2-4) W e are not persuaded that the legislature intended to create a special category of petty

misdemeanor specific to the Insurance Code. Felonies, misdemeanors, and petty misdemeanors are defined in the Criminal Code, and as we stated in our discussion of issue 1, the Insurance Code expresses no legislative intent to preempt the Criminal Code but, instead, to supplement it. Therefore, we reverse on this issue and hold that acting as an insurance consultant without a license is a petty misdemeanor, and the prosecution of this charge was barred by a one-year statute of limitations.

ISSUES 4 and 6

Defendant has not responded to our proposed disposition of issue 6, that there was sufficient evidence to support a conviction for holding herself out as an insurance consultant without a license. However, because we have held that this charge was barred by the statute of limitations, we will not address this issue further.

Defendant continues to argue, however, that there was insufficient evidence before the trial court to support her conviction for fraud. (1VHO 9-10) On appeal, the issue is whether substantial evidence of either a direct or circumstantial nature exists to support the verdict with respect to every element

essential to the conviction; the appellate court views the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all reasonable inferences in favor of the verdict. See State v. Apodaca, 118 N.M. 762, 765-66, 887 P.2d 756, 759-60 (1994).

As we stated in our notice, the jury was instructed that to find Defendant guilty of fraud, the State had to prove beyond a reasonable doubt that Defendant misrepresented a fact to Victim with the intent to deceive, that because of the misrepresentation and Victim's reliance on it, Defendant obtained $4,037 belonging to someone other than Defendant. (R.P. 163) We also stated, in our calendar notice, Defendant represented in her docketing statement that there was also evidence before the jury that Defendant was the Victims' insurance agent, and that when Victims paid $4,037 to Defendant, they believed it was for additional insurance. (DS 8-9) Thus, a reasonable juror could infer that Defendant misrepresented to Victims that she was going to use the money Victims gave her to purchase additional insurance.

Defendant argues that there was also evidence at trial that at the time Victims wrote a check to Defendant for $4,037, Victims were insured by a different company and had a different

insurance agent, and thus Defendant could not have defrauded them. (IvilO 10) When there is a conflict in the evidence, it is for "the fact-finder to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lay." State v. Rovbal, 115 N.M. 27, 30, 846 P.2d 333, 336 (Ct. App. 1992). Accordingly, for the reasons set forth in our calendar notice, we hold there was sufficient evidence to support Defendant's conviction fir fraud.

ISSUE 5

In her docketing statement, Defendant argued that the trial court erred in granting the State's motion to quash her subpoena to the Victim's certified public accountant. (DS 12) The subpoena sought the "combined financial statements, unaudited, [sic] and the statements of income and statements of cash flow of Bubble City, Inc., Joseph A. and/or Tony K. Wilkins for the years 1993 through the present date." (RP 118)

Defendant argued that she would have shown through specific facts that Victim had made prior inconsistent statements concerning their business practices. 'DS 8) Because Defendant did not inform us of the basis of the trial court's decision, we presumed correctness on the pan of the trial court. See State v. Weber, 76

N.M. 636, 644, 417 P.2d 444 449 (1966). We proposed to hold that the trial court had not abused its discretion in quashing Defendant's subpoena because the court could reasonably have determined that Defendant intended to impeach Victim's testimony with extrinsic evidence of a prior inconsistent statement. which is proscribed by Rule 11-613(B) NMRA 2000. We stated that under Rule 5-507 NMRA 2000, the trial court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or from the risk of physical harm, intimidation, bribery, or economic reprisals."

In her memorandum in opposition to our proposed disposition, Defendant informs us that the basis of the trial court's ruling quashing the subpoena was that it would not permit a fishing expedition, that he did not see the relevance of the victims accounting practices other than "peripheral impeachment," and that under Rule 11-613(B) extrinsic evidence could not be used to impeach Victims' testimony. (k9O 11) Consequently. there was a reasonable basis for the trial court's decision o quash the subpoena, and we hold that the court did not abuse its discretion. Therefore, for the reasons set forth herein and in our calendar notice, we affirm the district court's judgment on issues 1, 2, 4, 5

and 6, but we reverse Defendant's conviction for acting as an insurance consultant without a license.

IT IS SO ORDERED.

WE CONCUR:

LYNN PICKARD, Chief Judge

ICSAEL. D. BUSTAM[ANTE, Judge

RICHARD C. BOSSON, Judge

STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

STATE OF NEW MEXICO
Plaintiff,

V. No. CR-98-935-1

CHERI SMITH, Defendant.

MOTION TO REVOKE PROBATION

COMES NOW the State, and hereby requests the court for an order revoking the Probation of the defendant and issuing a summons for the defendant in this case and as grounds therefor states:

1. That the Defendant/Probationer was ordered in the Judgment and Sentence to pay restitution in the amount of $7,001.40 to Joe and Toni Wilkins. The Defendant has paid no restitution

2. The Defendant/Probationer failed to negotiate a promissory note as required by the Judgment and Sentence and has been out of the Department of Corrections for over nine (9) months. The Defendant/Probationer has been supervised by Parole Officer Arlon Chester in Chandler, Arizona.

Appendix E

WHEREFORE, the State of New Mexico requests the Court to issue a summons requiring the defendant to appear before the Court to answer the allegations in this motion. The Defendant is currently at 348 W. Chandler Blvd., Chandler, AZ 85225.

GREGORY M. TUCKER
District Attorney
Eleventh Judicial District, Div. I
7450 E. Main
Farmington, NM 87402
(505) 325-7555

By: _____
SANDRA A. PRICE
Chief Deputy District Attorney

cc: Public Defender Dept.
DA# 98-2018

NEW MEXICO CORRECTIONS DEPARTMENT
PROBATION AND PAROLE DIVISION

ELEVENTH DISTRICT COURT- AZTEC COUNTY OF SAN JUAN

STATE OF NEW MEXICO

Cause #: CR-98-935-1
D.A. Number.
S T ATE OF NEW MEXICO Plaintiff, vs

SMITH, CHERI Defendant,

Order of Probation

Now, on this 7th day of February, 2000, in accordance with authority conferred by the State of New Mexico, The Honorable WILLIAM BIRDSALL, sitting in and for this District Court at AZTEC, New Mexico, places you under probation supervision for a period of five years, beginning 02.07-01. You are to be under probation supervision until 02-07-05, or until further order of the Court (Discharge date reflects 0 day(s) of pre-sentence confinement credit)

IT IS THE ORDER OF THIS COURT that you comply with the following standard and special conditions of probation.

1 You will not violate any of the taws or ordinances of the State of New Mexico, or any other jurisdiction, and you shall not endanger the person or property-of another

2 You will report to your Probation Officer as often as required and will. submit completed and truthful *written reports between the first and tenth day of each month All communication with your ProbationParole Officer will be truthful and accurate and you will promptly reply to any correspondence or* communication you may receive from the Probation Office..

You will get permission from your Probation Officer before. a) leaving the county where you are being supervised

Appendix F

and/or residing, b) changing jobs, c) changing .residence; or d) engaging in any major financial contract or debt.

4 You will not associate with any person identified by your Probation Officer as being detrimental to your probation supervision, which may include persons having a criminal record, other probationers and parolees, and victims or witnesses of your crime or crimes.

5 YOU 'Ill follow all orders and instructions of your Probation Officer including actively participating in and successfully completing any level of supervision and/or treatment program, which may include community corrections, intensive supervision, electronic monitoring, or other supervision/treatment program, as deemed appropriate by the Probation.-Parole Officer.

6. You will permit any Probation Officer to visit you at your home or place of employment at any time and you will permit a warrantless search, by a Probation Officer, of your person, automobile, residence, property and/or living quarters if he/she has reasonable cause to believe that such a search will produce evidence of a violation of your conditions of probation.

7 Unless exempted, you will make every effort to obtain and hold a legitimate job and fulfill all financial obligations required of you including support of your family. You shall cooperate with your Probation Officer in any effort to assist you in obtaining employment. If you lose your job for any reason, you shall report this fact to your Probation Officer within 48 hours of the change

You will not buy, sell, own or have in your possession, at any time, firearms or other deadly weapons

9 You will not buy, sell, consume, possess or distribute any controlled substance except those legally prescribed for your use by a state certified medical doctor. You will also provide urine specimens for laboratory analysis• upon request of the Probation-Parole Division

10 You will report any arrest. charge or questioning by a peace officer to your Probation Officer within 48 hours of the incident, The toll free number, 1-800-428-5586, is available for emergency contact with your Probation Officer

If your probation supervision is transferred to another state, you will abide by any additional supervision conditions required by that state

12. You will not enter into any agreement to act, or act as an °informer' or special agent for any law enforcement agency without the permission of the Director of Probation and Parole Division and the sentencing judge

13.. You will submit yourself for photographing and fingerprinting as directed by the Probation-Parole Division and may be charged a fee for photographing.

SPECIAL CONDITIONS:

A. You will pay restitution, as directed by your Probation Officer in the amount of S7901 40 in monthly payments of $131 69 per month payable by money order through the Farmington probation office

5. You will sign a promissory note agreeing to continue to make monthly payments of $131 69, on any owed restitution remaining after probation has expired until the restitution amount is paid in full.

C. You will provide signed documentation from any future employer, indicating that they are aware that you have been convicted of a felony crime involving dishonesty.

D. You will not use alcoholic beverages to excess and will submit to any testing requested by the probation office

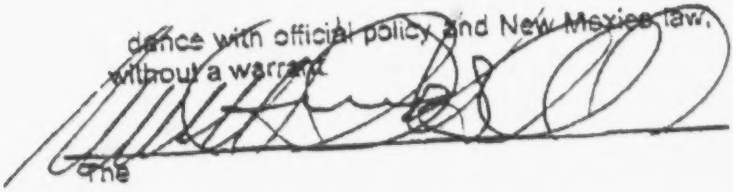
E You will participate in and complete any educational and/or vocational training as dire by Adult Probation and Parole

F. You will enter, participate, and successfully complete any out-patient or inpatient counseling or treatment as directed by the Adult Probation Office.

G. You will pay DNA fee in the amount of $100 00 no later than (10-10-2003) , for transmittal through the Adult Probation Department.

YOU are hereby advised that under the law of the Court, it may at any time during the probation term issue a warrant for your arrest and your probation may be revoked if you violate any one of the conditions of this Order during the time of your probation. When acting in accordance with official policy and New Mexico law, your Probation Officer has the authority to have you arrested without a warrant.

dance with official policy and New Mexico law,
without a warrant.



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Honors IL

I have read and understand the terms of this Probation Order and will abide by its terms

CHERI SMITH , Probationer

I I In h 1

terms.

New Mexico Corrections Department
PROBATION AND PAROLE DIVISION
Promissory Note

I promise to pay the sum of $7901 40, and fees and other charges provided herein for this restitution

CHERI SMITH agrees to pay as follows;

60 payments of $13169 of principal on the 10th day of every month beginning 12-10-01, and continuing until this Note is paid in full

This restitution is payable in full on 02-07-06 SMITH, CHERI must repay the outstanding principal *balance of the restitution then due The victim in the case is under no obligation to agree to change in* payment at any time.

CHERI SMITH may prepay at any time, the entire indebtedness or any part thereof evidenced by this Note and such prepayments shall be applied in the manner scheduled payments are applied Partial prepayments shall not postpone the due date of any subsequent monthly installments or change the amount of such installments and shall not postpone the due date for payment of the indebtedness evidenced by this Note

Default. I will be in default on this Note if any one of more of the following occurs; I fail to make a payment on time or in the amount due

I die, am declared incompetent, or become bankrupt or insolvent

I fail to keep any promise contained in this Note, or any other written agreement with the Victim I make any written statement or provide any financial information that is untrue or Inaccurate

If any other event occurs which reasonably causes the Victim to be Insecure about being repaid

Attorney's Fees. If the victim hires a lawyer (at any time or from time to time) to collect or protect his/her rights under this Note due to my failure to comply with the conditions set herein, I agree to pay the fee, plus the Victim's costs and other expenses

Applicable law; This Note will be governed by the law of the State of New Mexico

Signatures. Each person who signs this agreement acknowledges receipt a copy

Dated this _____ 6th Day of Nov, 01 _____

Offenders address.
15606 S Gilbert: 34 Chandler, Arizona 85225
Signed. CHERI SMITH Witnessed.

ARLIN L. CHESTER, P.O. II

Promissory Note Revised: 2x72/01

Page 1
Run Date. 10/17/O1

Payment will be made out to Joe or Tony Wilkins in the form of a money order or cashier's check and mailed to:
New Mexico Corrections Department Probation/ Parole division
101 W. Animas
Farmington, NM 87401
(as per scheduled payment note herein)

STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

STATE OF NEW MEXICO

V.

No. CR 98-935-1

CHERI SMITH DOB: 11/31/56 SSN: 486-47-0784

JUDGMENT, SENTENCE AND ORDER
PARTIALLY SUSPENDING SENTENCE
AND COMMITMENT TO THE DEPARTMENT OF
CORRECTIONS

THIS MATTER came before the Court for sentencing on February 7, 2000. The State of New Mexico was represented by Sandra Price, District Attorney, appearing for and the Defendant was present personally and was represented by counsel, Mel B. O'Reilly. The Defendant was convicted by a jury on August 27, 1999 of the crimes of Embezzlement Over $2,500.00, a third degree felony, contrary to NMSA 1978, § 30-16-8, as charged in Count 1 of the Grand Jury Indictment on file herein ; Fraud Over $2,5000.00, a third degree felony, contrary to NMSA 1978, § 30-16-6, as charged in Count 2 of the Grand Jury Indictment on file herein; Acting As An Insurance Consultant Without A License, a misdemeanor, contrary to NMSA 1978, § 59A-11A-8, as joined to the Grand Jury Indictment on file herein. The Court considered any pre-sentence reports and statements by or on behalf of the

Appendix G

defendant, and other interested persons.

IT IS THE JUDGMENT AND SENTENCE of the Court that:

1. As to Count 1 the Defendant be committed to the custody of the New Mexico Corrections Department to be confined for the term of three (3) years. Upon completion of the prison term the Defendant shall be released under mandatory parole supervision for a period of two (2) years subject to the statutory provisions relating to conditions of parole and supervision and return of parolees.

2. As to Count 2 the Defendant be committed to the custody of the New Mexico Corrections Department to be confined for the term of three (3) years. Upon completion of the prison term the Defendant shall be released under mandatory parole supervision for a period of two (2) years subject to the statutory provisions relating to conditions of parole and supervision and return of parolees.

3 . As to the misdemeanor of Acting As An Insurance Consultant Without A License, the Defendant shall be committed to the custody of the New Mexico Corrections Department to be confined for the term of six (6) months. The sentences imposed shall run consecutively to each other

4. Execution of said sentences is suspended except for eighteen (18) months which shall be served in the Department of Corrections.. Upon completion of this term of incarceration the Defendant is ordered to be placed on probation for a period of five (5) years under the terms and conditions of the standard order of probation in effect in this district and on the further condition that the defendant obey all rules, regulations and orders of the New Mexico Corrections Department

Adult Parole and Probation authorities and observe all federal, state, county and city laws and ordinances and pay probation costs are hereby waived.

2. As a condition of probation the Defendant shall pay restitution in the amount of $7,901.40. through the New Mexico Corrections Department Adult Parole and Probation to Joe & Toni Wilkins

3. The Defendant shall sign a promissory note as to restitution.

4. The Defendant shall provide signed documentation from any future employer indicating that he/she is aware that the Defendant has been convicted of a felony involving a crime of dishonesty.

5. The Defendant while on probation the defendant shall not consume alcoholic beverages in access, and the defendant shall submit to any testing (blood, breath or urinalysis) requested of him by the Adult Probation and Parole Office.

6. The Defendant shall complete a designated education program deemed appropriate by the Court and/or Probation Officer.

7. The Defendant shall be screened for, participate in, and successfully complete any treatment as ordered by the Court and/or Probation Officer.

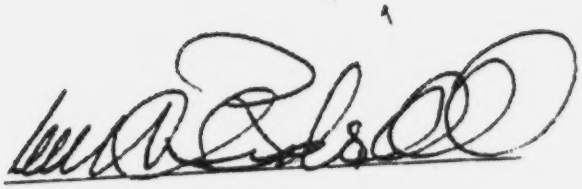
8. The Defendant shall pay a processing fee of $100.00 pursuant to the DNA Identification Act in the form of a money order through the Probation Office.

9. The Defendant shall submit to a DNA Sample as ordered the Court and/or Probation Officer.

10. The terms and conditions of probation are made terms and conditions of the suspended sentence. The Defendant, if imprisoned at any time pursuant to the above conviction, shall be given credit for pre-sentence confinement of one (1) day.

11. The Sheriff of San Juan County is commanded to take the defendant in custody and deliver the Defendant together with a copy of this Judgment, Sentence and Commitment to the Corrections Department to the Penitentiary of New Mexico or another corrections facility designated by the Corrections Department. The Corrections Department is commanded to receive the Defendant and execute this Judgment and Sentence according to law.

12. Any bail or bond posted in this cause is released, and the clerk of the Court is ordered to return any cash bail or bond to the person having posted it. sh bail or bond to the person having posted it.



District Judge

Copies to.

- District Attorney
- Defense Counsel
- Adult Probation and Parole Office
  San Juan County Detention Center
  SO

DA File #: 98-2018

New Mexico Statutes

New Mexico Statutes
CHAPTER 31 Criminal Procedure
ARTICLE 5 Interstate Compacts

31-5-20 Interstate Compact for Adult Offender Supervision.]

Effective June 19, 2002, passage of 35 States.

The Interstate Compact for Adult Offender Supervision is enacted into law and entered into on behalf of New Mexico with any and all other states legally joining therein in a form substantially as follows:

INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION

ARTICLE I — Purpose

A. The compacting states to this interstate compact recognize that each state is responsible for the supervision of adult offenders in the community and is authorized pursuant to the bylaws and rules of this compact to travel across state lines both to and from each compacting state in such a manner as to track the location of offenders, transfer supervision

authority in an orderly and efficient manner and, when necessary, return offenders to the originating jurisdictions. The compacting states also recognize that congress, by enacting the Crime Control Act, 4 U.S.C. § 112, 1965, has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime.

B. It is the purpose of this compact and the interstate commission created hereunder, through means of joint and cooperative action among the compacting states:

(1) to provide the framework for the promotion of public safety and protection of the rights of victims in the community through the control and regulation of the interstate movement of offenders;

(2) to provide for the effective tracking, supervision and rehabilitation of these offenders by the sending and receiving states; and

(3) to equitably distribute the costs, benefits and obligations of the compact among the compacting states.

C. In addition, this compact will:

(1) create an interstate commission that will establish

uniform procedures to manage the movement between states of adults placed under community supervision and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies and that will promulgate rules to achieve the purpose of this compact;

(2) ensure an opportunity for input and timely notice to victims and to jurisdictions as to where defined offenders are authorized to travel or to relocate across state lines;

(3) establish a system of uniform data collection, access to information on active cases by authorized criminal justice officials and regular reporting of compact activities to heads of state councils, state executive, judicial and legislative branches and criminal justice administrators;

(4) monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct noncompliance; and

(5) coordinate training and education regarding regulations of interstate movement of offenders for officials involved in such activity.

D. The compacting states recognize that there is no "right" of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender under supervision subject to the provisions of this compact and bylaws and rules promulgated hereunder.

E. It is the policy of the compacting states that the activities conducted by the interstate commission created herein are the formation of public policies and are therefore public business.

ARTICLE II — Definitions

As used in this compact, unless the context clearly requires a different construction:

A. "adult" means both individuals legally classified as adults and juveniles treated as adults by court order, statute or operation of law;

B. "bylaws" mean those bylaws established by the interstate commission for its governance or for directing or controlling the interstate commission's actions or conduct;

C. "compact" means the Interstate Compact for Adult Offender Supervision;

D. "compact administrator" means the individual in each compacting state appointed pursuant to the terms of this compact responsible for the administration and management of the state's supervision and transfer of offenders subject to the terms of this compact, the rules adopted by the interstate commission and policies adopted by the state council under this compact:

E. "compacting state" means any state that has enacted the enabling legislation for this compact;

F. "commit loner" means the voting representative of each compacting state appointed pursuant to Article III of this compact;

G. "interstate commission" means the interstate commission for adult offender supervision established by this compact;

H. "member" means the commissioner of a compacting state or his designee, who shall be a person officially connected with the commissioner;

I. "non-compacting state" means any state that has not enacted the enabling legislation for this compact;

J. "offender" means an adult placed under or subject to

supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies;

K. "person means any individual, corporation, business enterprise or other legal entity, either public or private;

L. "rules" jeans acts of the interstate commission, duly promulgated pursuant to Article VIII of this compact, substantially affecting interested parties in addition to the interstate commission, which shall have the force and effect of law in the compacting states;

M. "state" means a state of the United States, the District of Columbia and any other territorial possessions of the United States; and

N. "state council" means the resident members of the state council for interstate adult offender supervision created by each compacting state under Article IV of this compact.

ARTICLE III — The Compact Commission

A. The compacting states hereby create the "interstate commission for adult offender supervision". The interstate

commission shall be a body corporate and joint agency of the compacting state The interstate commission shall have all the responsibilities, powers and duties set forth herein, including the power to sue and be sued and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact. The interstate commission shall consist of commissioners selected and appointed by resident members of a state council for interstate adult offender supervision for each state. In addition to the commissioners who are the voting representatives of each state, the interstate commission shall include individuals who are not commissioners but who are members of interested organizations; such non-commissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general and crime victims. All non-commissioner members of the interstate commission shall be ex-officio, nonvoting members. The interstate commission may provide in its bylaws for such additional, ex-officio, nonvoting members as it deems

necessary.

B. Each compacting state represented at any meeting of the interstate commission is entitled to one vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the bylaws of the interstate commission. The interstate commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of twenty-seven or more compacting states, shall call additional meetings. Public notice shall be given of all meetings and meetings shall be open to the public.

C. The interstate commission shall establish an executive committee that shall include commission officers, members and others as shall be determined by the bylaws. The executive committee shall have the power to act on behalf of the interstate commission during periods when the interstate commission is not in session, with the exception of rulemaking and amendment to the compact. The executive committee shall oversee the day-to-day activities managed by the executive director and interstate commission staff, administer

enforcement and compliance with the provisions of the compact and its bylaws as directed by the interstate commission and perform other duties as directed by the interstate commission or set forth in the bylaws.

ARTICLE IV — The State Council

Each compacting state shall create a "state council for interstate adult offender supervision" that shall be responsible for the appointment of the commissioner who shall serve on the interstate commission from that state. Each state council shall appoint as its commissioner the compact administrator from that state to serve on the interstate commission in such capacity under or pursuant to applicable law of the compacting state. While each compacting state may determine the membership of its own state council, its membership must include at least one representative from the legislative, judicial and executive branches of government and victims groups and its compact administrator Each compacting state retains the right to determine the qualifications of the compact administrator who shall be appointed by the state council or by the governor in consultation with the legislature and the

judiciary. In addition to appointment of its commissioner to the interstate commission, each state council shall exercise oversight and advocacy concerning its participation in interstate commission activities and other duties as may be determined by each compacting state, including development of policy concerning operations and procedures of the compact within that state.

ARTICLE V — Powers and Duties of the Interstate Commission

The interstate commission shall have the following powers:

A. to adopt a seal and suitable bylaws governing the management and operation of the interstate commission;

B. to promulgate rules that shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact;

C. to oversee, supervise and coordinate the interstate movement of offenders subject to the terms of this compact and any bylaws adopted and rules promulgated by the interstate commission;

D. to enforce compliance with compact provisions and

interstate commission rules and bylaws, using all necessary and proper means, including the use of judicial process;

E. to establish and maintain offices;

F. to purchase and maintain insurance and bonds;

G. to borrow, accept or contract for services of personnel, including members and their staffs;

H. to establish and appoint committees and hire staff that it deems necessary for the carrying out of its functions, including an executive committee as required by Article III that shall have the power to act on behalf of the interstate commission in carrying out its powers and duties hereunder;

I. to elect or appoint such officers, attorneys, employees, agents or consultants and to fix their compensation, define their duties and determine their qualifications; and to establish the interstate commission's personnel policies and programs relating to, among other things, conflicts of interest, rates of compensation and qualifications of personnel;

J. to accept any and all donations and grants of money, equipment, supplies, materials and services and to receive, utilize and dispose of same;

K. to lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve or use any property, real, personal or mixed;

L. to sell, convey, mortgage, pledge, lease, exchange, abandon or otherwise dispose of any property, real, personal or mixed;

M. to establish a budget and make expenditures and levy dues as provided in Article X of this compact;

N. to sue and be sued;

O. to provide for dispute resolution among compacting states;

P. to perform such functions as may be necessary or appropriate to achieve the purposes of this compact;

Q. to report annually to the legislatures, governors, judiciary and state councils of the compacting states concerning the activities of the interstate commission during the preceding year. The reports shall also include any recommendations that may have been adopted by the interstate commission;

R. to coordinate education, training and public awareness regarding the interstate movement of offenders for officials

involved in such activity; and

S. to establish uniform standards for the reporting, collecting and exchanging of data.

ARTICLE VI — Organization and Operation of the Interstate Commission

A. The interstate commission shall, by a majority of the members, within twelve months of the first interstate commission meeting, adopt bylaws to govern its conduct as may be necessary or appropriate to carry out the purposes of the compact, including:

(1) establishing the fiscal year of the interstate commission;

(2) establishing an executive committee and such other committees as may be necessary;

(3) providing reasonable standards and procedures:

(a) for he establishment of committees; and

(b) for any general or specific delegation of any authority or function of the interstate commission;

(4) providing reasonable procedures for calling and conducting meetings of the interstate commission and ensuring reasonable notice of each such meeting;

(5) establishing the titles and responsibilities of the officers of the interstate commission;

(6) providing reasonable standards and procedures for the establishment of the personnel policies and programs of the interstate commission. Notwithstanding any civil service or other similar laws of any compacting state, the bylaws shall exclusively govern the personnel policies and programs of the interstate commission;

(7) providing a mechanism for winding-up the operations of the interstate commission and for the equitable return of any surplus funds that may exist upon the termination of the compact after the payment and reserving of all of its debts and obligations;

(8) providing transition rules for "start-up" administration of the compact; and

(9) establishing standards and procedures for compliance and technical assistance in carrying out the compact.

B. The interstate commission shall, by a majority of the members, elect from among its members a chairperson and a vice chairperson, each of whom shall have such authorities and

duties as may be specified in the bylaws. The chairperson or, in his absence or disability, the vice chairperson, shall preside at all meetings of the interstate commission. The officers so elected shall serve without compensation or remuneration from the interstate commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for any actual and necessary costs and expenses incurred by them in the performance of their duties and responsibilities as officers of the interstate commission. The interstate commission shall, through its executive committee, appoint or retain an executive director for such period, upon such terms and conditions and for such compensation as the interstate commission may deem appropriate. The executive director shall serve as secretary to the interstate commission, and hire and supervise such other staff as may be authorized by the interstate commission, but shall not be a member.

C. The interstate commission shall maintain its corporate books and records in accordance with the bylaws.

D. The members, officers, executive director and employees of the interstate commission shall be immune from suit and

liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities; provided that nothing in this paragraph shall be construed to protect any such person from suit or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of any such person. The interstate commission shall defend the commissioner of a compacting state, or his representatives or employees or the interstate commission's representatives or employees, in any civil action seeking to impose liability, arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from intentional wrongdoing on the part of such person. The interstate

commission shall indemnify and hold the commissioner of a compacting state, the appointed designee or employees or the interstate commission's representatives or employees, harmless in the amount of any settlement or judgment obtained against such persons arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from gross negligence or intentional wrongdoing on the part of such person.

ARTICLE VII — Activities of the Interstate Commission

A. The interstate commission shall meet and take such actions as are consistent with the provisions of this compact.

B. Except as otherwise provided in this compact and unless a greater percentage is required by the bylaws, in order to constitute an act of the interstate commission such act shall have been taken at a meeting of the interstate commission and shall have received an affirmative vote of a majority of the

members present.

C. Each member of the interstate commission shall have the right and power to cast a vote to which that compacting state is entitled and to participate in the business and affairs of the interstate commission. A member shall vote in person on behalf of the compacting state and shall not delegate a vote to another compacting state. However, a state council shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the compacting state at a specified meeting. The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication. Any voting conducted by telephone, or other means of telecommunication or electronic communication shall be subject to the same quorum requirements of meetings where members are present in person.

D. The interstate commission shall meet at least once during each calendar year The chairperson of the interstate commission may call additional meetings at any time and, upon the request of a majority of the members, shall call

additional meetings.

E. The interstate commission's bylaws shall establish conditions id procedures under which the interstate commission shall make its information and official records available to the public for inspection or copying. The interstate commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests. In promulgating such rules, the interstate commission may make available to law enforcement agencies records and information otherwise exempt from disclosure, and may enter into agreements with law enforcement agencies to receive or exchange information or records subject to non-disclosure and confidentiality provisions.

F. Public notice shall be given of all meetings and all meetings shall be open to the public, except as set forth in the rules or as otherwise provided in the compact. The interstate commission shall promulgate rules consistent with the principles contained in the federal Government in the Sunshine Act, 5 U.S.C. § 552 (b), as may be amended. The

interstate commission and any of its committees may close a meeting to the public where it determines by a two-thirds' vote that a meeting would be likely to:

(1) relate solely to the interstate commission's internal personnel practices and procedures;

(2) disclose matters specifically exempted from disclosure by statute;

(3) disclose trade secrets or commercial or financial information that is privileged or confidential;

(4) involved accusing any person of a crime, or formally censuring any person;

(5) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(6) disclose investigatory records compiled for law enforcement purposes;

(7) disclose information contained in or related to examination, operating or condition reports prepared by, or on behalf of or for the use of, the interstate commission with respect to a regulated entity for the purpose of regulation or

supervision of such entity;

(8) disclose information, the premature disclosure of which would significantly endanger the life of a person or the stability of a regulated entity; or

(9) specifically relate to the interstate commission's issuance of a subpoena or its participation in a civil action or proceeding.

G. For every meeting closed pursuant to this provision, the interstate commissions chief legal officer shall, publicly certify that, in his opinion, the meeting may be closed to the public, and shall reference each relevant exemptive provision. The interstate commission shall keep minutes that shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and the reasons there for, including a description of each of the views expressed on any item and the record of any roll-call vote, reflected in the vote of each member on the question. All documents considered in connection with any action shall be identified in the minutes.

H. The interstate commission shall collect standardized data

concerning the interstate movement of offenders as directed through its bylaws and rules, which shall specify the data to be collected, the means of collection and data exchange and reporting requirements.

ARTICLE VIII — Rulemaking Functions of the Interstate Commission

A. The interstate commission shall promulgate rules in order to effectively and efficiently achieve the purposes of the compact, including transition rules governing administration of the compact during the period in which it is being considered and enacted by the states.Rulemaking shall occur pursuant to the criteria set forth in this article and the bylaws and rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq., and the federal Advisory Committee Act, 5 U.S.C. § 1 et seq., as may be amended. All rules and amendments shall become binding as of the date specified in each rule or amendment.

B. If a majority of the legislatures of the compacting states rejects a rule, by enactment of a statute or resolution in the

same manner used to adopt the compact, then such rule shall have no further force and effect in any compacting state.

C. When promulgating a rule, the interstate commission shall:

(1) publish the proposed rule stating with particularity the text of the rule that is proposed and the reason for the proposed rule;

(2) allow persons to submit written data, facts, opinions and arguments, which information shall be publicly available;

(3) provide an opportunity for an informal hearing; and

(4) promulgate a final rule and its effective date, if appropriate, based on the rulemaking record.

D. Not later than sixty days after a rule is promulgated, any interested person may file a petition in the United States district court for the District of Columbia or in the federal district court where the interstate commission's principal office is located for judicial review of such rule. If the court finds that the interstate commission's action is not supported by substantial evidence, as defined in the Administrative Procedure Act, in the rulemaking record, the court shall hold

the rule unlawful and set it aside. Subjects to be addressed within twelve months after the first meeting must at a minimum include:

(1) notice to victims and opportunity to be heard;

(2) offender registration and compliance;

(3) violations or returns;

(4) transfer procedures and forms;

(5) eligibility for transfer;

(6) collection of restitution and fees from offenders;

(7) data collection and reporting;

(8) the level of supervision to be provided by the receiving state;

(9) transition rules governing the operation of the compact and the interstate commission during all or part of the period between the effective date of the compact and the date on which the last eligible state adopts the compact; and

(10) mediation, arbitration and dispute resolution.

E. The existing rules governing the operation of the previous compact superseded by this compact shall be null and void twelve months after the first meeting of the interstate

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commission created hereunder.

F. Upon determination by the interstate commission that an emergency exists, it may promulgate an emergency rule that shall become effective immediately upon adoption, provided that the usual rulemaking procedures provided hereunder shall be retroactively applied to said rule as soon as reasonably possible, in no event later than ninety days after the effective date of the rule.

ARTICLE IX — Oversight, Enforcement, and Dispute Resolution by the Interstate Commission

A. The interstate commission shall oversee the interstate movement of adult offenders in the compacting states and shall monitor such activities being administered in non-compacting states that may significantly affect compacting states. The courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the compact's purposes and intent. In any judicial or administrative proceeding in a compacting state pertaining to the subject matter of this compact that may affect the powers, responsibilities or actions of the interstate

commission, the interstate commission shall be entitled to receive all service of process in any such proceeding and shall have standing to intervene in the proceeding for all purposes.

B. The compacting states shall report to the interstate commission on issues or activities of concern to them and cooperate with and support the interstate commission in the discharge of its duties and responsibilities. The interstate commission shall attempt to resolve any disputes or other issues that are subject to the compact and that may arise among compacting states and non-compacting states. The interstate commission shall enact a bylaw or promulgate a rule providing for both mediation and binding dispute resolution for disputes among the compacting states.

C. The interstate commission, in the reasonable exercise of its discretion, shall enforce the provisions of this compact using any or all means set forth in Section B of Article XII of this compact.

ARTICLE X — Finance

A. The interstate commission shall pay or provide for the payment of the reasonable expenses of its establishment,

organization and ongoing activities.

B. The interstate commission shall levy on and collect an annual assessment from each compacting state to cover the cost of the internal operations and activities of the interstate commission and its staff that must be in a total amount sufficient to cover the interstate commission's annuall budget as approved each year. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the interstate commission, taking into consideration the population of the compacting state and the volume of interstate movement of offenders in each compacting state and shall promulgate a rule binding upon all compacting states that governs said assessment.

C. The interstate commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same; nor shall the interstate commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

D. The interstate commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements

of the interstate commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the interstate commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the interstate commission.

ARTICTLE XI — Compacting States, Effective Date and Amendment

A. Any state is eligible to become a compacting state. The compact shall become effective and binding upon legislative enactment of the compact into law by no less than thirty-five of the states. The initial effective date shall be the later of July 1, 2001, or upon enactment into law by the thirty-fifth state. Thereafter it shall become effective and binding, as to any other compacting state; upon enactment of the compact into law by that state. The governors of non-compacting states or their designees will be invited to participate in interstate commission activities on a non-voting basis prior to adoption of the compact by all states and territories of the United States.

B. Amendment to the compact may be proposed by the interstate commission for enactment by the compacting states. No amendment shall become effective and binding upon the interstate commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states.

ARTICLE XII — Withdrawal, Default, Termination and Judicial Enforcement

A. Once effective, the compact shall continue in force and remain binding upon each and every compacting state; provided that a compacting state may withdraw from the compact by enacting a statute specifically repealing the statute that enacted the compact into law. The effective date of withdrawal is the effective date of the repeal. The withdrawing state shall immediately notify the chairperson of the interstate commission in writing upon the introduction of legislation repealing this compact in the withdrawing state. The interstate commission shall notify the other compacting states of the

withdrawing state's intent to withdraw within sixty days of its receipt thereof The withdrawing state is responsible for all assessments, obligations and liabilities incurred through the effective date of withdrawal, including any obligations, the performance of which extend beyond the effective date of withdrawal. Reinstatement following withdrawal of any compacting state shall occur upon the withdrawing state reenacting the compact or upon such later date as determined by the interstate commission.

B. If the interstate commission determines that any compacting state has at any time defaulted in they performance of any of its obligations or responsibilities under this compact, the bylaws or any duly promulgated rules, the interstate commission may impose any or all of the following penalties:

(1) fines, fees and costs in such amounts as are deemed to be reasonable as fixed by the interstate commission;

(2) remedial training and technical assistance as directed by the interstate commission; and

(3) suspension and termination of membership in the

compact. Suspension shall be imposed only after all other reasonable means of securing compliance under the bylaws and rules have been exhausted. Immediate notice of suspension shall be given by the interstate commission to the governor, the chief justice or chief judicial officer of the state, the majority and minority leaders of the defaulting state's legislature and the state council.

The grounds for default include failure of a compacting state to perform such obligations or responsibilities imposed upon it by this compact, interstate commission bylaws or duly promulgated rules. The interstate commission shall immediately notify the defaulting state in writing of the penalty imposed by the interstate commission on the defaulting state pending a cure of the default. The interstate commission shall stipulate the conditions and the time period within which the defaulting state must cure its default. If the defaulting state fails to cure the default within the time period specified by the interstate commission, in addition to any other penalties imposed herein, the defaulting state may be terminated from the compact upon an affirmative vote of a majority of the

compacting states, and all rights, privileges and benefits conferred by this compact shall be terminated from the effective date of suspension. Within sixty days of the effective date of termination of a defaulting state, the interstate commission shall notify the governor, the chief justice or chief judicial officer and the majority and minority leaders of the defaulting state's legislature and the state council of such termination. The defaulting state is responsible for all assessments, obligations and liabilities incurred through the effective date of termination, including any obligations, the performance of which extends beyond the effective date of termination. The interstate commission shall not bear any costs relating to the defaulting state unless otherwise mutually agreed upon between the interstate commission and the defaulting state. Reinstatement following termination of any compacting state requires both a re-enactment of the compact by the defaulting state and the approval of the interstate commission pursuant to the rules.

C. <u>The interstate commission may, by majority vote of the members, initiate legal action in the United States district court</u>

for the District of Columbia or, at the discretion of the interstate commission, in the federal district where the interstate commission has its offices to enforce compliance with the provisions of the compact and its duly promulgated rules and bylaws against any compacting state in default. In the event judicial enforcement is necessary, the prevailing party shall be awarded all costs of such litigation, including reasonable attorney fees.

D. The compact dissolves effective upon the date of the withdrawal or default of the compacting state, which reduces membership in the compact to one compacting state. Upon the dissolution of this compact, the compact becomes null and void and shall be of no further force or effect, and the business and affairs of the interstate commission shall be wound-up and any surplus funds shall be distributed in accordance with the bylaws.

ARTICLE XIII — Severability and Construction

A. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision is deemed unenforceable, the remaining provisions of the compact shall

be enforceable.

B. The provisions of this compact shall be liberally constructed to effectuate its purposes.

ARTICLE XIV — Binding Effect of Compact and Other Laws

A. Nothing herein prevents the enforcement of any other law of a compacting state that is not inconsistent with this compact. All compacting states' laws conflicting with this compact are superseded to the extent of the conflict.

B. All lawful actions of the interstate commission, including all rules and bylaws promulgated by the interstate commission, are binding upon the compacting states. All agreements between the interstate commission and the compacting states are binding in accordance with their terms. Upon the request of a party to a conflict over meaning or interpretation of interstate commission actions, and upon a majority vote of the compacting states, the interstate commission may issue advisory opinions regarding such meaning or interpretation. In the event any provision of this compact exceeds the constitutional limits imposed on the

Legislature of any compacting state, the obligations, duties, powers or jurisdiction sought to be conferred by such provision upon the interstate commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the compacting state and shall be exercised by the agency thereof to which such obligations, duties, powers or jurisdiction are delegated by law in effect at the time this compact becomes effective.

History: Laws 2001 ch. 322, § 1.

TRANSCRIPT OF PROCEEDINGS; 7/1/99

1 ELEVENTH JUDICIAL DISTRICT COURT

COUNTY OF SAN JUAN

2 STATE OF NEW MEXICO

3 No. CR-98-899-6 and CR-98-935-6

4 STATE OF NEW MEXICO,

5 Plaintiff,

6 vs.

7 CHERI SMITH,

8 Defendant.

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10 TRANSCRIPT OF PROCEEDINGS 7/1/99

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14

15 BEFORE THE HONORABLE WILLIAM C. BIRDSALL

Appendix I

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18
19 REPORTED BY: Debra L. Williams, RPR, NM CCR
20 Williams Court Reporting
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21
22
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24
25

for me to look at. And that's the first that I knew that there were additional documents besides that which Mr. Novis or his predecessor, Mr. Villers, had obtained. The report of Mr. Volkenberg is not in either of those searches.

Now, with regards to the particular report, Your Honor, the expert opinion is not as clear. And I'm suggesting to you that we may even have an issue come up, Your Honor, as to whether it says what counsel thinks it says.

THE COURT: Well, but that's a different issue. My concern is this: Is -

MR. O'REILLY: Did I have time to adequately prepare it? No, I have not, Your Honor, and let me tell you why. It was last Wednesday when we were here, I asked to, at the conclusion of our hearing, I requested the availability of the district attorney to review the evidence in the file. She told me she had a preliminary hearing.

I went to her office at the -- an hour after the appointed time, because I had called at 2:30 and she was not back. I left word at the district attorney's office that I was there to review documents that she had received and

22 reports that she had received, would they contact her at her

23 preliminary hearing and make them available to me.

24 I went by the office at 3:30. I met with assistant

25 district attorney Jim Stein. And instead of receiving

TRANSCRIPT OF PROCEEDINGS; 7/1/99

discovery, It was served the new Complaint, the draft of that new Complaint, and told that I couldn't see the discovery because it was in the district attorney's trial book. And I told that I wanted to see the information furnished with regards to the consulting agreement and the checks and things of that nature. I didn't want to see the district attorney's trial book, I wanted to see the evidence. I was told I could not see it.

The next day, I called and I requested that document, Mr. Volkenberg's report, which I had been alerted to on the 23rd, be faxed to me. I called Mr. Van Volkenberg. He was out of the office. When I called back to him, he was on vacation. He will be out of the office on vacation until July the 6th.

Your Honor, the particular document that has been examined requires some very leading testing ability. And I need to know, number one, if he even possesses the equipment to do the testing; number two, what source he used to confirm that, in fact, the equipment is capable of testing. This is a really unique area called fontology. And I don't see anywhere in his credentials that he's fontologist. I've even

gone so far, Your Honor, as to try to find out what type of equipment this -- was used to generate this document. And the report of the expert doesn't address that issue. He doesn't say anything more than this is a computer-generated

IN THE 11TH JUDICIAL DISTRICT

AZTEC, NEW MEXICO

STATE OF NEW MEXICO,	)	
Plaintiff,	)	
-vs.-	)	NO. CR 98-935-1
SHARISE SMITH,	)	
Defendant.	)	

TRANSCRIPT OF TAPED PROCEEDINGS

BEFORE: HON. WILLIAM BIRDSALL

APPEARANCES: MS. SANDRA A. PRICE
Chief Deputy
Assistant District
Attorney
Representing the
State

Appendix J

COPY

in order to have an attorney appointed.

MS. SMITH: Okay.

THE COURT: I'm going to let you do that. You can

MS. SMITH: I will go visit them today as soon as

we're done, Your Honor.

THE COURT: They can do anything at all that they want to do, and some of these motions are not going to go anywhere, ma'am, but we want to - we need to get you an attorney in order for you to have adequate representation.

We will come back on the 26th of November at 8:00 a.m.. You will have done what you need to do as far as contacting the Public Defender by then, and we'll go forward.

MS. SMITH: Yes, Your Honor.

Your Honor, I do have one other

matter, if I may

15 address the Court while we're here.

16 THE COURT: Yes.

17 MS. SMITH: It should have been addressed

some time

18 ago. If I may, Your Honor, I would like to approach Your

Honor

19 and hand him a document, and I will give it to the District

20 Attorney's Office.

21 THE COURT: What is the document, ma'am?

22 MS. SMITH: It is an order.

23 "It comes now this order on the remand from the New

24 Mexico Appellate Court and the Court thus being advised.

25 Therefore it's now ordered Defendant's misdemeanor

conviction

1 of acting as an insurance consultant without a license is

2 reversed and misdemeanor charge of acting as an

insurance

3 consultant with a license is dismissed."

4 This was ordered a year ago, and it has not been

done, Your Honor.

THE COURT: I have a copy of that. The State will need to do an amended judgment and sentence that reflects the - I think they in effect dismissed it. I'm not sure.

MS. PRICE: Yes, we did, Your Honor.

THE COURT: Let's go ahead and do an amended judgment and sentence that would reflect that so we'll have a clean slate on that.

MS. SMITH: Your Honor, do we need to do a re-sentencing, because I know in my sentence that is taken into consideration as well?

THE COURT: The judgment and sentence by removing the one that was dismissed by the Appellate Court will effectively foreshorten the probationary period. The J&S will state that. I won't revisit my decision on your sentencing.

MS. SMITH: Okay.

THE COURT: I will just be an automatic mathematical reduction.

Yes, Ms. Price?

MS. PRICE: My recollection is it actually ran concurrent with some of the charges.

1 was faxed to me, which indicates they do have my fax number. I
2 think we need to play on a level ground like the law says we'
3 supposed to.
4 THE COURT: That's right. You both need to serve each
5 other with anything that you file with the Court.
6 MS. SMITH: And the Chief District Attorney has not
7 done that thus far.
8 MS. PRICE: Your Honor, I did not have her address
9 until I got the letter from -
10 THE COURT: Okay, okay, okay.
11 MS. SMITH: Your Honor -
12 THE COURT: We know we've got the address now.
13 MS. PRICE: I have the fax number. Right.
14 MS. SMITH: Your Honor, I beg to differ. She received
15 a fax prior to my motion. She has had it from day one. She
16 has just lied to the Court and I want it in the court record.
17 This is not going in the w[illegible] was supposed to. She had the
18 fax number and address since she filed the revocation. She got
19 it from my parole officer, Your Honor. She just lied to you.
20 THE COURT: Okay. Well, we'll deal with that at some
21 other date. Maybe on the 26th when we see if you've got a

22 lawyer.

23 Thank you.

24 Let's take a break.

25 (End of taped proceedings.)

The Parole and Probation Compact Administrators' Association

Manual

Chapter 3

Rules

With rules effective March 28, 2001

Appendix K

CHAPTER 3

RULES

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RULES OF PRACTICE

A major portion of the final recommendations of the National Commission to Restructure the Compact consisted of Rules of Practice for the operation of the Compact and Compact Offices. Minor amendments to the Rules were adopted by the Parole and Probation Compact Administrators' Association and have been incorporated in the Rules as set forth herein. These rules are promulgated under the Compact provision allowing the administrators of the various states to jointly adopt rules of procedure for operations under the Compact.

RULES FOR OPERATIONS UNDER THE COMPACT

SECTION 100 - LEGAL NOTES ON THE COMPACT

Section 1-100.
DEFINITIONS (Family definition revised 3/28/2001)

(A) Absconder - A parolee or probationer is considered as an absconder when he/she fails to report and his or her whereabouts are unknown. It must be verified that the offender is no longer living at his or her listed residence. An unsuccessful effort to locate the offender through his/her employment is also required.

(B) Civil Probation or Parole - Shall refer to persons whose freedom or activities are subject to limitation, supervision, or other restraint where such limitation, supervision, or restraint originates from charges brought against such individual which are civil and not criminal in nature.

(C) Concurrent Supervision - Supervision of a parolee or probationer by two separate authorities, i.e., federal and state authorities jointly. This term is also applied when an offender is being supervised by a state for a conviction received in that state as well as convictions received in one or more sending states.

(D) Conditional Release - Shall refer to those persons who have been released from incarceration after adjudication of guilt and sentencing with such continued release contingent for a period of time upon the adherence by such person to specified conditions.

(E) Court Ordered Transfer - A Court Order Transfer is one in which the transfer is authorized on a written order on the record executed by a Court in a criminal proceeding pertaining to a person supervised or to be supervised under the Compact. Suggested wording would be - supervision may be transferred to (receiving state).

(F) Detainer - an order to hold a parolee or probationer in custody.

(G) Discharge - final completion of the sentence which was imposed

on offender by the sending state.

(H) Extradition - Delivery from one state to another of a fugitive upon agreement of the governor or chief executive of the state in which the fugitive is found. Return of parolees or probationers under the terms of the Compact agreement can preclude formal extradition.

(I) Extraordinary Medical Condition - Medical conditions in offenders which include infectious diseases, diagnosed psychological disorders or medical conditions that may affect the course of the supervision by the receiving state.

(J) Failure to Report - This term applies to a parolee or probationer whose whereabouts are known but who fails to report to his/her assigned officer as ordered or directed.

(K) Family – Shall be parents, grandparents, adult children, adult siblings, legal spouse, legal guardian, and step-parent. (Effective 3/28/2001)

(L) Misdemeanant - A person convicted of a minor offense for which the sending state's statute provides a lesser penalty than for a felony.

(M) Non-Convicted Offender - Shall mean offenders for whom a court has ordered supervision prior to an adjudication of guilt, including individuals released to supervision on their own recognizance. Non-convicted offenders may be supervised under the Compact only pursuant to agreement by the sending and receiving states where statutory authority exists.

(N) Parole - A release from prison, given to a prisoner before expiration of sentence, on condition of future good behavior.

(O) Pre-Parole Investigation - Shall mean any investigation or inquiry regarding an individual who has requested transfer under the Compact which relates either to that individual's release, parole or suitability for transfer.

(P) Probable Cause Hearing - A hearing conducted in behalf of a parole or probation violator in compliance with the U.S. Supreme

Court's rulings in *Morrissey v. Brewer* and *Gagnon v. Scarpelli.* Also referred to as a Preliminary Hearing, Preliminary Probable Cause Hearing, On-Site Hearing or On-Site Probable Cause Hearing.

(Q) Probation - Shall mean court-order supervision after a plea of guilty or a trial and adjudication of guilt.

(R) Post-Sentence - Shall refer to the time period after a court has, based upon a plea or adjudication of guilt, determined conditionally or otherwise the penalty for an offense and has announced said penalty in open court or in an open or closed record of said court.

(S) Provisional Travel Permit - A travel permit issued to allow an offender to travel to a receiving state for the purpose of transfer of supervision.

(T) Receiving State - In the process of transfer of supervision of parolees or probationers, the state which is requested to assume supervision of an offender.

(U) Resident - For the purpose of transfer of supervision under the terms of the Compact, a parolee or probationer may be considered a resident of a state if the offender has been an actual inhabitant of such state continuously for more than one year prior to coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which the offender has been convicted.

(V) Rule Variance - An exception to the "Rules For Operations Under The Compact," agreed upon in writing by two states, to facilitate handling of the case of an offender in which they have some mutual interest.

(W) Sending State - In the process of transfer of supervision of a parolee or probationer, the state requesting transfer of supervision.

(X) Special Condition - Conditions or terms added to the standard conditions of parole or probation by either the sending or receiving state.

(Y) Special Investigation - A non-Compact investigation, usually an

investigation of arrest or conviction of a parole or probationer in behalf of another state on a courtesy basis.

(Z) Supervision Fee - A fee collected to compensate for the cost of supervision of an offender.

(AA) Temporary Travel Permit - A travel permit issued to allow an offender to visit another state for a period not to exceed thirty (30) days. This type of travel permit is not used in conjunction with travel for the purpose of transfer of supervision.

(BB) Third Party State - In the process of transfer of supervision of a parolee or probationer, a state, other than the original receiving state, that is requested to assume supervision of an offender. Also a state, other than the sending or receiving state, to which a parole or probation violator may have fled or absconded.

(CC) Waiver - A formal written statement relinquishing some right, claim or privilege.

Section 1-101.
CONGRESSIONAL CONSENT

The Interstate Compact for the Supervision of Probationers and Parolees is authorized by Congress under the Crime Control Act of 1934.

Commentary

The Interstate Compact for the Supervision of Probationers and Parolees was developed by the states under the Congressional consent given in advance by the Crime Control Act of 1934 which states in part: " [A]n Act granting consent of Congress to any two or more states to enter into agreements or compacts for cooperative efforts and mutual assistance in the prevention of crime and for other purposes."

There is a solid foundation of legal precedent supporting the legality and constitutionality of the Interstate Compact for the Supervision of Probationers and Parolees. To date, no state court of last resort has ever handed down an unfavorable decision. The legality and constitutionality of the Compact has also been tested in the federal courts, again with no unfavorable decision having been issued against the Interstate Compact. The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes and obligating the member states to the

provisions of the agreement as though it were a binding contract as well as a statute entered into by the member states. See the Legal Digest for citations and summaries of court decisions.1

Section 1-102.
VIOLATIONS OF INTERSTATE COMPACT AND GRIEVANCE PROCEDURE
(Effective 3/28/2001)

Violations of the Interstate Compact Agreement shall initially be addressed informally by the states involved in the dispute. If a resolution cannot be reached a formal grievance shall be initiated. The grievance process shall address the issue through the following steps:

Step 1: The complaining state shall contact the working individual (Compact Administrator or Deputy Compact Administrator) in the offending state by mail, electronic correspondence, or by phone in an effort to resolve the dispute informally.

Step 2: If the dispute cannot be resolved at the informal level a Parole and Probation Compact Administrators' Association Grievance Form, with all necessary attachments, shall be forwarded to The Executive Council Chair and the

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1 1 See also Aveline, 728 A.2d at 1257 n.10 (found in McComb v. Wambaugh, 934 F.2d 474 (3rd Cir. 1991) observed that:

[c]ompacts have the characteristics of contracts because the enactment of the compact terms as part of an enabling statue by one state is viewed as an offer. The offer may be accepted through enactment of statutes including the same compact terms by another state. As with other contracts, the Contract Clause of the United States Constitution protects compacts from impairment by the states. This means that upon enacting a compact, it takes precedence over the subsequent statues of signatory states and, as such, a state may not unilaterally nullify, revoke or amend one of its compacts if the compact does not so provide." (Internal citation omitted.)

BEST AVAILABLE COPY

Compact Administrator of the offending state. The Executive Council Chair shall discuss the grievance with the involved states and provide a written informal opinion to them within five working days. The involved states shall indicate acceptance or rejection of the opinion on the grievance form within five working days. If any involved state(s) rejects the written opinion, the grievance will proceed to Step 3. The Executive Council Chair is prohibited from participating in a grievance involving his or her own state. In such cases the grievance would be forwarded to the PPCAA President-Elect.

Step 3: The Executive Council Chair shall convene the Council.

a. The Council shall render a ruling on the grievance within ten working days.
b. The President Elect may serve as a substitute for a Council member in the event of an absence or if there is a conflict of interest.
c. The Executive Council Chair shall forward a decision to the Compact Administrator of the Offending State, the Governor of the Offending State, and the Compact Administrator of the complaining state. If appropriate, a time frame shall be set for the offending state to comply with the Council ruling.

Step 4: If the offending state fails to comply with the ruling the complaining state shall send a written notification to the Executive Council Chair. The Council shall be convened to impose sanctions on the offending state. Sanctions available to the Council are as follows:

a. Seek the assistance of the offending state's legal counsel.
b. Seek the assistance of the offending state's Attorney General.
c. Seek the assistance of the United States Attorney General.

d. Orchestrate a succession of letters from neutral states urging reconsideration by the offending state.
e. Write a letter of reprimand to the offending state's Compact Administrator or Deputy Compact Administrator with copies to the Administrators' immediate superior.
f. Write a letter of reprimand to the offending state's Compact Administrator or Deputy Compact Administrator with copies to the Administrator's immediate superior and the Governor.
g. Write a letter of complaint to the Governor of the offending state.
h. Seek the assistance of the Legislature of the offending state.
i. Request a vote of censure by the full membership of the PPCAA.
j. Request the withdrawal of the offending state from the Compact through the appropriate legislative process.
k. Take necessary and appropriate legal action.
l. Other -as the particular situation suggests.

Step 5: The Executive Council will monitor the sanctions imposed until the final outcome of the process.

(See Chapter 4 (forms) for Grievance form)

Section 1-103.
COMPUTER AUTOMATION

A receiving state shall accept as sufficient for investigation and/or acceptance for supervision data transferred to it from an automated system pursuant to any requirements imposed by the Compact Administrators or these rules.

Commentary

This section assumes that the intent of the drafters of the Compact was to use the most efficient means available for Compact operations.

The advent of automation technology was not recognized in the Compact rules previously. This section recognizes the availability of such means for information transfer, and legitimizes such transfers under the agreement methods available in the transfer of information.

Section 1-104.
AMENDMENTS TO THE RULES AND REGULATIONS

Amendments to these rules and regulations shall be adopted finally when agreed to by three-fifths of the administrators of the states signatory to the Compact.

Commentary

Article 5 of the Compact provides that the administrators shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of the Compact. The rules and regulations in the Compact Manual carry the same authority as the Compact and therefore it is desirable that amendments or changes be made only after adequate study and consideration have been given to the subject by the administrators. Upon adoption of a rule, however, all states shall give the same credence to the rules and regulations as given to the Compact.

Section 1-105.
NUMBER OF ADMINISTRATORS/DEPUTY COMPACT ADMINISTRATORS

Each state shall have one Compact Administrator and no more than two Deputy Compact Administrators designated by the Administrator thereof.

Commentary

The framers of the Compact understood that in order to ensure consistency in the interpretation of the Compact and uniformity in application, a limited number of Administrators/Deputy Compact Administrators was necessary. Information shall be channeled through Compact Offices and the Administrator and Deputies are responsible for dissemination.

SECTION 200 ELIGIBILITY FOR SUPERVISION

Section 2-101.
ELIGIBILITY FOR SUPERVISION

Any state (sending state) who is a party to the Compact may permit any probationer or parolee to reside in any other state (receiving state) party to this Compact, while on probation or parole, if:

(a) such person is in fact a resident of or has family residing within the receiving state and can obtain employment there. The offender shall have an offer of employment or a visible means of support;

(b) though not a resident of the receiving state and not having family residing there, the receiving state consents to such person being sent.

Commentary

Article (1) of the Interstate Compact for the Supervision of Probationers and Parolees provides that "it shall be competent for the duly constituted judicial and administrative authorities of a state party to this Compact (herein called 'sending state'), to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this Compact (herein called 'receiving state'), while on probation or parole, if (a) such person is in fact a resident of or has family residing within the receiving state and can obtain employment there. The offender shall have an offer of employment or a visible means of support;

(b) though not a resident of the receiving state and not having family residing there, the receiving state consents to such person being sent there. Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one (1) year prior to coming to the sending state and has

not resided within the sending state more than six (6) continuous months immediately preceding the commission of the offense for which the conviction occurred.

The Association has refused to adopt proposals for rigid interpretations of the Compact's language regarding residence, family, and employment. The view has always been that the language must be representative of the collaborative effort of its members which makes the Compact a success. The Association's view of desirable policy regarding acceptance of cases for supervision is that individuals should be accepted not only when they have legal residence or relatives in the receiving state, but also when it appears there is a plan for the individual which has merit and will serve to aid in the ultimate rehabilitation of the offender. There may be state laws requiring parolees to have jobs before leaving prison. This would not be applicable to persons sent from other states for supervision.

The receiving state serves only as agent of the sending state and may not determine the conditions of parole or probation in the sending state, but may and should offer recommendations pertaining to such conditions, and impose its own special conditions effective within the receiving state. There is nothing restrictive in the Compact language referring to felony offenses and/or misdemeanor offenses. The Compact covers any infraction of the law, major or minor, for which there has been a conviction.

Section 2-102.
MILITARY PERSONNEL

Military personnel shall be processed as any other Compact case, however, mere physical presence in another state for military service does not change residence for purposes of the Compact.

Section 2-103.
CONCURRENT SUPERVISION (Revised 1-27-98)

A probationer or parolee who is sent to another state for concurrent supervision under the Compact, shall be processed and supervised in the same manner as any other Compact case.

Should there be an occasion when the receiving state rejects a concurrent supervision case, it shall provide annual progress reports, if requested by the sending state, until the closing of the rejecting state's case or upon expiration of the sending state's case, whichever occurs first. The rejecting state shall immediately notify the sending state of any violation or termination of supervision in its case.

Each progress report shall address the offender's living arrangements, employment, and response to supervision.

Commentary

The Parole and Probation Compact Administrators' Association encourages the acceptance of supervision in these situations as a matter of expediency and public safety. Clearly the sending state has an interest in monitoring the offender's adjustment while he/she resides in the receiving state. Any special conditions imposed in the order for supervision are assumed to be written as enhancements to the supervision plan and should be addressed by the supervising agency. It is important for the receiving state to recognize those interests and cooperate by providing information to the sending state, if not supervision under the Compact.

Section 2-104.
JUVENILES (Effective 3/28/2001)

No juvenile shall be eligible for supervision under the Compact unless the juvenile has been convicted in judicial proceedings as an adult, requiring adult supervision.

Commentary

Since adjudication of delinquency is not considered a "conviction," generally, juveniles are not eligible for supervision under the Interstate Parole and Probation Compact.

Section 2-105.
MERCHANT SEAMEN

Permission to serve in the Merchant Marine may be granted only in select cases. No parolee/probationer may do so unless the parolee or probationer was a Merchant Seaman (with papers) prior to commitment.

Commentary

Permission to serve in the Merchant Marine should only be granted in select cases and only if the individual was a Merchant Seaman (with papers) prior to commitment. If the individual is scheduled to remain in an out-of-state port for a substantial amount of time, the receiving state's administrator should be notified and given the opportunity to provide supervision.

Section 2-106.
PRETRIAL DIVERSION CASES

Member states of the Compact may enter into agreements under the Compact with other member states where statutory authority exists under which non-convicted persons may be supervised.

Commentary

At the time of adoption of the Compact, pre-trial diversion and similar pre-conviction programs for dealing with offenders were not

in frequent use. The development of such programs over recent decades requires that Compact rules be altered to allow for such cases to be handled under the Compact pursuant to agreements that individual Compact states may make with one another. It is the intent of this section to allow such agreements to occur.

Section 2-107.
MISDEMEANANTS

Misdemeanants are eligible for supervision under the Compact.

Section 2-108.
FURLOUGH, WORK RELEASE, OR OTHER PRE-PAROLE RELEASE

No offender released on furlough, work release, or any other pre-parole release program is eligible for supervision under the Compact.

Commentary

Offenders released on furlough, work release, or any other pre-parole release are not eligible for supervision as Compact cases, and cannot be returned as violators under the Compact.

Section 2-109.
NON-CONVICTED OFFENDERS

Non-convicted persons who are subject under order of a court to be supervised are not ordinarily subject to supervision under the Compact. However, where reciprocal legislation or other law exists allowing such transfer and supervision, states may do so pursuant to the other authorizing law.

Commentary

When the Compact was entered into in 1937, diversion programs and other supervisory programs not involving conviction did not exist. The language of the Compact explicitly states that it is for "... any person convicted of an offense," therefore, non-convicted persons on probation are technically not eligible for supervision under the

Compact. However, it is the position of the PPCAA that a non-convicted person who is subject under order of a court to be supervised may be transferred under the Compact if both the sending and receiving states agree to transfer.

Section 2-110.
SPECIAL CONDITIONS

A) Any receiving state which chooses not to enforce or is not able to enforce a special condition placed upon a parolee or probationer by the sending state shall notify the sending state, as soon as is possible, that the special condition will not be enforced.

B) Any receiving state which imposes an additional condition upon a parolee or probationer shall notify the sending state of said condition as soon as is possible.

Commentary

Whenever a special condition is imposed on a parolee or probationer, the sending state shall, as a part of a request for transfer, fully disclose the special condition, the reason for its existence, and all related information to the receiving state. The receiving state should make every effort to meet the special condition. If a receiving state chooses or is not able to enforce a special condition upon a parolee or probationer, the sending state must be notified that the special condition will not be enforced. The sending state may then choose to either decline to transfer the offender or to transfer the offender with knowledge that the special condition will not be enforced. Where such conditions cannot be enforced, they should be altered by the sending state in accordance with its procedures. Special conditions may be imposed by receiving states as well as by sending states. This section recognizes this and imposes a duty upon the receiving state to notify the sending state of any additional conditions imposed upon the parolee or probationer. See PPCAA Executive Council Rulings Section, Ruling No. 1 - Receiving State's Right to Add Special Conditions.

Section 2-111.
EXTRAORDINARY CONDITIONS **MEDICAL/PSYCHOLOGICAL**

When transferring under the Interstate Compact a parolee or probationer with an extraordinary medical/psychological condition the sending state shall fully disclose all relevant known information regarding an offender's condition and shall obtain a signed waiver from the offender allowing for such disclosure.

Commentary

When transferring under the Interstate Compact a parolee or probationer with an extraordinary medical/psychological condition such as an infectious disease, the sending state must fully disclose all relevant known information regarding the offender's condition. A sending state must also obtain a signed waiver from the offender allowing for such disclosure. The clear intent of the Compact itself as well as this provision is to hold that where a parolee or probationer otherwise meets the eligibility requirements of the Compact for mandatory acceptance, states may not reject such a transfer because of the existence of an extraordinary medical/psychological condition.

Section 2-112.
VICTIM NOTIFICATION (Effective 3/28/2001)

Victim notification requirements are the responsibility of the sending state in accordance with the laws and policies of the sending state. The sending state will request information as necessary to fulfill victim notification requirements. The receiving state will respond to requests from the sending state within five (5) working days.

To assure compliance and proper handling of victim issues within the receiving state, the interstate compact office of the receiving state shall be the initial point of contact for referral of all victim issues.

Commentary: Many states have victim laws whose requirements vary widely. The Council's intent is to design a rule that allows states the flexibility to comply with their laws. Any special victim issues in a case should be communicated to the receiving state at the time of the transfer request or when necessary. The Council realizes

that all requested information may not be available within five (5) working days. If this is the case, the response within the five-day period should indicate the anticipated date of completion.

SECTION 300 ARRANGEMENTS FOR SUPERVISION: STANDARDS AND PROCEDURES

Section 3-101.
OPPORTUNITY TO INVESTIGATE - Revised 1-27-98

INVESTIGATION OF PAROLE AND PROBATION PLAN

Any parolee or probationer residing outside the jurisdiction of the sentencing state must be referred for a transfer investigation and decision by the state in which he/she resides. In all cases, except emergency situations, or probation cases in which the offender already lives in the receiving state at the time of sentencing, the receiving state shall be given the opportunity to investigate the prospective plan of the individual prior to movement to the receiving state.

I. PROBATION PLAN INVESTIGATION WHEN OFFENDER RESIDES IN ANOTHER JURISDICTION AT THE TIME OF SENTENCING

When an offender has been placed on probation and lives in another state at the time of sentencing the offender may be given a provisional travel permit and be allowed to return to his/her home pending an investigation by the receiving state.

Upon knowledge of the sending state's Interstate Compact Office that the probationer has returned to the receiving state, the sending state shall immediately notify the receiving state of the offender's presence in the receiving state.

The sending state shall request reporting instructions and the receiving state may provide reporting instructions at its discretion.

The sending state shall remain responsible for supervision of the case until the receiving state completes an investigation and accepts a transfer of supervision.

The sending state shall mail the proposed transfer request to the receiving state no later than twenty-one calendar days after notification of the offender's presence in the receiving state. The

transfer request shall contain 2 copies of a completed PPCAA Form IA, ? Investigation Request? , and all other appropriate information as outlined in Rule 3-103.

A completed investigation containing an acceptance or rejection shall be sent by the receiving state to the sending state within 45 days of the receipt of the investigation request by the receiving state's Interstate Compact Office.

If the receiving state rejects supervision, it is the responsibility of the sending state to arrange for the removal of the probationer from the receiving state.

II. PRE-PAROLE PLAN INVESTIGATION

The sending state shall mail the proposed pre-parole plan to the receiving state no sooner that 90 (ninety) days in advance of the planned placement.

The sending state must send two (2) completed copies of Form IA, ? Investigation Request and all other appropriate information as outlined in Rule 3-103 ? Request for Supervision Information. The receiving state must acknowledge in writing receipt of the case.

A completed investigation containing an acceptance with reporting instructions or a rejection shall be sent to the sending state within 45 days of receipt of the investigation request by the receiving state's Interstate Compact Office.

If a parolee has not proceeded to the receiving state within 120 days after acceptance or confirmation of the validity of the original plan by the receiving state, the receiving state may withdraw its acceptance and close interest with notification to the sending state. The sending state may ask for a reinvestigation of the proposed plan but shall await another acceptance prior allowing the parolee to proceed.

III. INVESTIGATION PLAN OF PAROLEE OR PROBATIONER PRESENTLY UNDER SUPERVISION - Non Emergency

An offender already under supervision who is requesting transfer to another jurisdiction shall remain in the state where he/she is residing

until the receiving state accepts the case for supervision or at its discretion, provides reporting instructions. The receiving state shall complete the investigation and notify the sending state of its decision within 45 days of receipt of the transfer request in the receiving state's Interstate Compact Office. All acceptance decisions should also include reporting instructions.

IV. EMERGENCY INVESTIGATION REQUEST FOR PAROLEE OR PROBATIONER PRESENTLY UNDER SUPERVISION. (DISCRETION OF RECEIVING STATE)

A state may request an Emergency Investigation of any parole or probation plan if it believes an actual emergency exists.

If the receiving state agrees that an emergency exists and consents to perform an emergency investigation, the sending state shall immediately send to the receiving state by facsimile or electronic mail all documents delineated in rule 3-103.

The receiving state may, upon its discretion, provide reporting instructions. The receiving state may complete an investigation within fifteen business days and advise if the plan is acceptable immediately upon completion of the investigation. If the transfer is accepted and prior reporting instructions have not been provided, the acceptance should include reporting instructions. If reporting instructions were previously granted, the offender shall be placed under immediate supervision.

If the plan is rejected by the receiving state and reporting instructions were previously provided, the offender must immediately return to the sending state. It shall be the responsibility of the sending state to ensure that the offender returns.

If the receiving state does not agree that an emergency exists, this section is not applicable and the transfer shall be governed by section III of this rule.

COMMENTARY: Although permitting offenders to proceed to a receiving state prior to investigation and acceptance of a plan should be generally discourages, there are circumstances which dictate the offender's travel there are a necessity. These circumstances include

probationers who already reside in the receiving state at the time of sentencing, or an emergency situation such as a death in the immediate family which requires the offender's presence to provide continued exclusive care of elderly or dependent relatives, or the imminent threat of the loss of employment. Typically no offender should be allowed to proceed as the result of an emergency situation unless the receiving state has been informed and agrees that an emergency exists. It is the responsibility of the sending state to verify the need for immediate travel to the receiving state through the appropriate sources ie, physicians, employers, landlords, and Court documents. The nature of the offender's present offense, prior criminal history, risk to the community, and adjustment to supervision are important factors in determining whether the offender should be allowed to travel to another state prior to completion of an investigation.

In all cases where the offender has been, or will be, allowed to travel to the receiving state pending transfer, it is the responsibility of the sending state to immediately notify the receiving state of the offender's departure. The sending state should request reporting instructions and give them to the offender should the receiving state comply. Although the provision of reporting instructions is left to the discretion of the receiving state, this action is encouraged by the PPCAA.

At no time is the receiving state required to provide supervision prior to formal acceptance of the proposed transfer. Supervision responsibilities and liabilities remain with the sending state. Reporting instructions are not to be construed as a transfer of supervision responsibilities or acceptance of the sending state's plan. Granting of reporting instructions by the receiving state is recommend and may facilitate subsequent investigation of the plan, but no attempt at supervision or case management is required prior to the receipt of case material, investigation of the plan, and formal acceptance.

Finally, it is emphasized that it is the responsibility of the sending state to arrange for the removal from the receiving state of any offender who has been allowed to proceed to the receiving state prior to formal acceptance and is later rejected for transfer of supervision.

Section 3-102.
CHANNELING CASES THROUGH THE ADMINISTRATOR'S OFFICE

Acceptance, rejection or termination of an interest in a Compact case shall only occur through the Compact Administrator's office or a designated deputy. All written and verbal communication shall be channeled through the Administrator's office or the office of a designated Deputy.

Commentary

This section clarifies the policy of the Administrators that a single agency in each state handle communications with other states relating to Compact cases.

Section 3-103.
REQUEST FOR SUPERVISION INFORMATION (Revised 9/27/1996)

A request for supervision shall contain a presentence investigation report or similar information from other reports which shall include the following information:

1) Criminal history of the parolee or probationer;

2) Description of the instant offense including information concerning any enhancement or reduction in the charge or penalty;

3) Copy of the conditions of parole or probation with commentary regarding any special conditions which have been imposed is granted. In pre-parole cases, the conditions shall be provided within 30 days after parole to plans in the receiving state;

4) Application for Compact Services and Agreement to Return Form;

5) Copy of the judgment and commitment;

6) Current supervision history of parolee or probationer in the sending state.

Commentary

Given the reality that some states do not have resources available to provide the following material, it is considered desirable, but not mandatory and should be included with the transfer request when it is readily available.

1) Photographs and fingerprints

2) Psychological reports;

3) Information regarding any medical condition which requires medication.

Section 3-104.
PRESENTENCE, PRECONVICTION AND POSTSENTENCE INVESTIGATIONS

Compact Administrators are not required to make presentence, preconviction, or postsentence investigations. (Revised 3/28/2001)

Commentary

Administrators sometimes receive requests for investigations regarding prospective placements of individuals w. have not been sentenced. It shall be noted that there is a great difference between making an investigation of an individual who has been convicted, but not yet sentenced, and making an investigation of an individual whose guilt has not been determined. Most Administrators seem to be willing to furnish presentence investigations. This is probably good practice in cases where the investigation will take some time and the court will be required to hold a probationer without a definite supervisory plan until the investigation report is received. The making of an investigation before conviction is another matter. The Association has agreed that Compact Administrators do not have any obligation to make such investigations since the Compact covers only "convicted" persons.

There may be state laws, which prevent an Administrator from making such an investigation even if the Administrator wishes to cooperate. Moreover, a person charged with a crime is presumed to be innocent and retains relevant rights until found guilty, so there may be considerable doubt as to the legality of certain investigations if such individual has not been convicted.

Administrators should try to cooperate by exchanging information to assist other states in presentence, preconviction, and postsentence investigations. It is difficult for states to make proper decisions when background information is unavailable. Administrators who request information should be specific about the type of information wanted. The investigating state shall be given adequate information about such things as addresses of relatives and former employers.

Section 3-105.
CONFIDENTIALITY OF RECORDS

Pre-parole and investigation reports which are exchanged between states in connection with interstate supervision are confidential.

Commentary

Pre-parole and investigation reports shall not be revealed directly or indirectly to any person not authorized to receive them. Administrators shall notify persons in charge of records that they are confidential.

Section 3-106.
DISAGREEMENTS OVER ACCEPTING CASES

No state shall refuse to supervise a parolee or probationer eligible under the Compact who has the necessary employment and residency qualifications. A receiving state cannot reject supervision based on a short period of supervision. Cases with less than 45 days supervision shall not be transferred.

Commentary

Under the terms of the Compact, no state shall refuse to supervise a parolee or probationer who has been convicted and who has the

necessary employment and residency qualifications. No state shall refuse to supervise if the offender is considered to be a poor risk, high profile case, or based upon crime(s). A receiving state cannot reject supervision based on a short period of supervision. Sending states are reminded, however, that receiving states have up to 45 days to investigate prior to acceptance. Therefore, cases with less than 45 days supervision shall not be transferred.

Section 3-107.
DIRECT CORRESPONDENCE WITH PRISONERS

Compact officials shall not engage in direct correspondence with prisoners of another state regarding prospects for interstate supervision.

Commentary

The procedure shall be that when an official receives such a letter, it will be acknowledged but will state that the official cannot act or give information on a case without a request from Compact officials in the sending state. Each state may devise a form letter to use in such cases.

Section 3-108.
ARRANGEMENTS FOR SUPERVISION IN A THIRD STATE

Transfer of supervision to a third-party state shall be processed by the sending state. The current supervising state shall notify the sending state prior to movement for purposes of changing residence. Sending states shall notify receiving states of acceptance of transfer by the third-party state.

Commentary

The state presently supervising the parolee or probationer will assist in having Form III signed if provided by the sending state, issue a travel permit, when properly authorized, with specific information included. This information shall then be sent to the sending state, which will forward such information to the third-party state. The sending state will notify the original receiving state when acceptance is made by the third state and notify it to close the file.

Section 3-109.
RETURN OF SUPERVISION TO THE SENDING STATE
(Effective 3/28/2001)

Prior to an offender being allowed to return to the sending state, the administrator of the sending state shall be notified and reporting instructions shall be requested. This notice shall include the address of residence, phone number, name and relationship of contact person, and date of departure. A travel permit will be furnished to the offender with a copy to the sending state.

Commentary

This rule is intended for offenders with a valid need for return as opposed to those in violation or those who present supervision problems. The sending state is encouraged to provide reporting instructions in an expeditious manner, but failure to do so will not preclude the offender's return. Prior to allowing the offender to return, the receiving state should consider special conditions, victim issues, and other pertinent matters that impact public safety. The travel permit shall include any reporting instructions provided the offender at the time of departure.

Section 3-110.
OBLIGATION TO PROVIDE FOR RETURN

A sending state shall provide for the return of violators supervised under the Compact, including expenses associated with such return, in a reasonable and expeditious manner.

Commentary

Fiscal constraints are not sufficient reason for failure to return violators under the Interstate Compact. It is the duty of the sending state to provide for the return of all offenders supervised under the Compact. Sending states shall provide for the return of violators from receiving states in a reasonable and expeditious manner.

Receiving states shall not be required to bear expenses associated

with a physical return to a sending state, except that no sending state shall be required to compensate a receiving state for expenses associated with the normal incarceration, judicial or administrative process of a receiving state. Additionally, neither the sending or receiving state shall ever send a bill for services to the other state.

Failure to return violators due to fiscal reasons may have liability implications for sending states.

Section 3-111.
RULE VARIANCES

Variances to the rules under this Compact, because of the emergency nature of the circumstances surrounding the need for said variance, may be implemented where clear and convincing evidence can be shown to exist of the need for such variance and where agreed upon in advance by the states affected by such variance. Variances shall be in writing, and should be filed with the Chair of the Executive Council.

Commentary

Variances shall be used when the states involved agree upon the need for the variance. Such cases should usually be extraordinary in nature, and variances agreed upon shall be in writing.

SECTION 400 STANDARDS OF RECIPROCAL SUPERVISION

Section 4-101.
RECIPROCAL DUTIES BETWEEN STATES

Each receiving state shall assume the duties of visitation of and supervision over probationers or parolees of any sending state transferred under the Compact, and in the exercise of those duties will be governed by the same standards which prevail for its own probationers or parolees.

Commentary

The same standard of supervision as applies in the receiving state in the supervision of its own parolees (and probationers) shall apply to out-of-state parolees (and probationers) sent there under the terms of this agreement. The general interpretation of Article (2) of the Compact is subject to no variation. There is unanimous agreement that this language means, in effect, that a receiving state is not expected to do more or less for out-of-state cases than it does for its own cases.

Section 4-102.
INTENSITY AND DURATION OF SUPERVISION

The duration of the parole/probation period in a Compact case shall be determined by the sending state. The degree of supervision shall be determined by the receiving state, but shall be consistent with the degree of supervision applied by the receiving state to its cases not involving the Compact.

Commentary

Some states have parole periods which are much longer than average. Where such periods are fixed by law, it is often impossible for the sending state to discharge a parolee even though the supervision is taking place in a receiving state which does not extend such lengthy supervision to its own parolees. States may place in the lowest level of supervision. Nothing in this section prohibits two states agreeing prior to transfer on the intensity and duration of supervision in a

particular case. In accordance with the clear intent of the Compact, sending states shall therefore determine length of supervision, with receiving states determining the degree of supervision applied. See PPCAA Interpretations: Legal & Administrative Section, Legal Opinion No. 1 Closing Supervision Interest.

Section 4-103.
REPORTING

The receiving state shall provide the sending state with annual progress reports, unless through the mutual consent of the Administrators involved, they are discontinued. Arrival reports shall be sent within 30 days after the offender's arrival in the receiving state.

Commentary

The foregoing rule as it applies to progress reports is not to be construed as preventing two or more signatory states from agreeing among themselves upon either more frequent reporting or less frequent reporting concerning their respective parolees or probationers. Progress reports shall cover present residence of the parolee or probationer, name of the employer, type and character of employment and the individual's general conduct and progress, as well as the individual's attitude toward supervision.

Section 4-104.
COLLECTION OF SUPERVISION FEES

No sending state shall impose a fee for the purpose of supervision on a parolee or probationer who is currently being supervised by another state under the Interstate Compact.

Commentary

It is the position of the Parole and Probation Compact Administrators' Association that only a receiving state shall charge a supervision fee. The reasoning behind this policy is that only the receiving state is performing the actual supervision of the parolee or probationer during this time after the transfer, and therefore only the receiving state can justify a "supervision" fee. Fees assessed by sending states for purposes other than "supervision" are not specifically addressed by this rule. Receiving states shall not charge a supervision fee in Compact cases in excess of the amount which would be imposed if the offender were a parolee or probationer of the receiving state.

Section 4-105.
COLLECTION OF MONEY BY THE SENDING STATE

All money which the sending state desires to collect from parolees or probationers for family support, support of children, restitution, reparation or costs of court or fines, are to be sent directly to the sending state by the parolee or probationer; and the receiving state agrees only to use its best endeavors to see that the individual sends such money as requested.

Commentary

Receiving states have no legal authority to administer the collection of funds on behalf of sending states. In addition, it is the belief of the Compact Administrators that requiring receiving states to collect funds on behalf of sending states would be ineffective and would place unnecessary burdens on receiving states to account for funds belonging to another state.

Section 4-106.
TEMPORARY/PROVISIONAL TRAVEL PERMITS

Although many Interstate Offices regulate travel permits for all parolees and probationers within their state, for PPCAA purposes travel permit policies pertain only to Compact cases.

1) Temporary Travel Permits
A receiving state shall have the discretionary authority to issue to a parolee or probationer a temporary travel permit to make visits out of the receiving state for a period not to exceed thirty (30) days.

2) Provisional Travel Permits
Provisional travel permits may be issued by a sending state to allow a parolee or probationer to proceed to a receiving state prior to completion of an investigation and formal acceptance of the case in emergency situations. See Section 3-101.

Commentary

The Interstate Compact has no authority or involvement in the granting of travel in non-Compact cases. Copies of Provisional Travel Permits are to be included in the investigation request transfer package. Also, copies of Temporary Travel Permits issued in Compact cases are to be provided to the appropriate sending state. Copies of Temporary Travel Permits issued in non-Compact cases will be mailed to states of travel only upon request of those states.

Section 4-106(1): The receiving state is authorized in appropriate cases to grant to the parolee (probationer) permission to make temporary visits out of the receiving state, not exceeding thirty days in length.

Before a parolee or probationer is given permission to visit in another state, advance notice of visits shall always be sent to the state to be visited if such Administrator of that state has indicated a desire for such notification.

Section 4-106(2): The provisional travel permit is to be used when travel is authorized by a sending state for a parolee or probationer to proceed to a receiving state and there remain pending case transfer. The precautions outlined in Section 3-101 shall be observed by the sending state Administrator before authorizing travel in these cases. If the receiving state rejects supervision of an individual following investigation of the plan, the parolee or probationer must return to the sending state. Provisional travel permits shall contain instructions to the parolee or probationer requiring return to the sending state if transfer of supervision is finally rejected by the receiving state. Travel permits shall be clearly marked as either temporary or provisional permits.

Sending states and receiving states are encouraged to utilize methods of electronic transfer of information to expedite communications in emergency cases.

Section 4-107.
CLOSING OF CASE RECORDS (Effective 3/28/2001)

1) The receiving state shall close its records and cease supervision of the parolees or probationers upon:

   A) Receipt of a certificate of discharge from supervision or upon a receipt of permission to close interest from the sending state.
   B) Notification of absconder status. Such closure shall not jeopardize the sending state's right to retake that individual without extradition. Should said absconder be located within the receiving state, the provisions of these rules and the Compact requiring the receiving state to hold a preliminary hearing shall still apply.
   C) Notification of institutionalization (per 4-109) or imprisonment.
   D) Notification of death.
   E) Return to sending state (per 3-109).

2) No receiving state shall close its records on a violator while the sending state is in the process of retaking the parolee or probationer.

Commentary

It has been established by various court decisions that even when the receiving state has closed its records on an absconder such closure does not jeopardize the right of the sending state to retake him/her without extradition.

A Certificate of Death will be provided if requested by the sending state.

A case shall not be closed on a violator while the sending state is in the process of retaking. The case shall be closed after the offender is removed from the receiving state or when the violator begins to serve a new sentence in the sending state. As a general principal receiving states shall treat Compact cases as they would treat their own state's non-Compact cases. (Effective 3/28/2001)

Section 4-108.
DISCHARGE IN RECEIVING STATE

The sending state shall notify the receiving state's Compact Administrator of a parolee or probationer's discharge from supervision.

Commentary

Notices of discharge shall always be sent to the receiving state's Administrator, so that they will not be in the position of supervising an individual who is no longer on probation or parole. The receiving state's authority to supervise springs from the fact that it is acting as "agent" for the sending state. Therefore, the receiving state shall not continue supervision when there has been a discharge.

It is noted that some states discharge supervisees despite the fact that the receiving state has called attention to the need for continued supervision. The sending state has a legal right to make the final decision regarding discharge; however, it also was agreed that there shall be cooperation in these matters.

Section 4-109.
SUPERVISION OF INDIVIDUALS WHO BECOME MENTALLY ILL OR PHYSICALLY HANDICAPPED WHILE IN THE RECEIVING STATE

A receiving state shall continue supervision of an offender who is determined to be mentally ill or physically handicapped while in the receiving state, unless the prognosis for recovery is diagnosed as long term or of a permanent nature, where the supervision of long-term commitments reverts back to the sending state.

Commentary

It must be remembered in setting supervision rules for the mentally ill or physically handicapped offender, that most such cases are committed for short terms or usually after being charged with a new offense in the receiving state. Closing and resuming Compact supervision on these short commitments would place a needless administrative burden on both the receiving and sending states.

Section 4-110.
INTERPRETATION AND PRACTICES REGARDING VIOLATORS

1) **Reports of Violations**
A receiving state shall promptly, upon violation, notify the sending state of such violation utilizing the appropriate forms provided for by these rules.

2) **Crimes Against the Laws of the Receiving State**
A receiving state may detain a parolee or probationer who has committed a crime against the laws of the receiving state and hold a trial on that offense.

3) **Detainers Placed by the Sending State**
The following are procedures regarding detainers placed by the sending state against interstate supervisees incarcerated in the receiving state:

A) A preliminary hearing shall be conducted as soon as possible by the receiving state and forwarded to the sending state if requested, except where a waiver admitting the fact of the violation has been executed.

B) The receiving state shall send full information to the sending state regarding such things as the nature of the crime and the length of the new sentence.

C) The sending state shall, when filing a detainer, send a letter to accompany the detainer to the receiving state expressing the wishes of the sending state when the individual is released from prison in the receiving state.

4) **Detainers Placed by a Receiving State**
Where allowed by the law of the receiving state, detainers or Compact warrants may be placed by a receiving state upon a violator under the Compact pending a warrant or revocation by the sending state.

5) **Requests for Preliminary Hearings**
All requests by sending states that a receiving state hold a preliminary hearing on a violation shall be honored, except where a waiver admitting the fact of the violation has been executed (unless waivers are prohibited by the sending state).

6) **Bail**
No interstate supervisee who has been arrested in the receiving state shall be admitted to bail while the sending state is in the process of returning the supervisee.

Commentary

Section 4-110(1): Section 5 of the Parole and Probation Rules and Regulations specifies that the receiving state shall "promptly upon violation notify the sending state." An Administrator must give due credit to the recommendations of individual field officers, but should screen notices of violation rather carefully to be sure that there is good and sufficient reason for asking the sending state to retake its parolee or probationer.

The term "revocation of parole" has different meanings under various state laws. When corresponding about violations with the receiving state, it may be well to substitute other terms, such as "delinquency status" or "suspension of parole."

Section 4-110(2): If a violator has committed a crime against the laws of the receiving state, that violator may, of course, be held and tried on new charges. This is in accordance with Article 3 of the Compact which states, if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or that suspicion exists of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharge from prosecution or from imprisonment for such offense."

Sending states clearly have a legal and contractual obligation under the Compact to return an individual where requested, just as receiving states have the related responsibility not to violate in Compact cases more readily than they do in their own cases. The length of a new sentence in the receiving state has no bearing on the sending state's

right to retake an individual once the sentence has been served.

Section 4-110(3): Subsection (B): The receiving state shall confront all available adverse witnesses at the preliminary hearing where the violation is technical or based on untried complaints. In the case of a new conviction, the receiving state shall send certified minutes of the conviction.

The receiving state shall authenticate any other materials including the violation report and summary of the preliminary (on site) hearing if required by the sending state.

Section 4-110(4): When an interstate supervisee has been arrested in the receiving state, such supervisee shall not be admitted to bail while the sending state is in the process of making the return. The Morrissey decision and subsequent court decisions are predicated upon the assumption that the preliminary hearing determines the existence of reason to hold the individual, therefore eliminating the basis for allowance of bail. There shall be a special effort made to advise police, prosecutors and judges of the existence of the sending state's violation warrant.

Section 4-111.
FACTORS INVOLVED IN THE MAKING OF A DECISION TO RETAKE A CASE

1) **Obligation to Retake a Violator**
A receiving state shall consider a parolee or probationer's residence and family ties before asking a sending state to retake a violator, particularly when the violator has only a few months left to serve for the sending state and is under a new sentence in the receiving state.

2) **Alternatives to Retaking Out-of-State Cases**
There are two alternatives to retaking out-of-state cases:

A) In the case of a violator who has committed a crime in the receiving state it may be possible to arrange concurrent supervision.

B) Any violator may be committed by the sending state to an institution of the receiving state if both states are signatory to the Out-of-State Incarceration Amendment.

3) **Continuation of Supervision when the Sending State Refuses to Retake a Violator**
A sending state shall apply the same standard for retaking of parolees or probationers as is applied to the taking custody of parolees or probationers within the sending state. The decision of the sending state to retake a person on parole or probation shall be conclusive and non-reviewable within the receiving state.

Commentary

Section 4-111(1): The receiving state shall try to give due consideration to residence and family ties before asking a sending state to retake a violator, particularly when the violator has only a few months left to serve for the sending state and is under a new sentence in the receiving state. The Association has adopted the following:

"That this Association go on record as favoring the

> continuance of the practice regarding return principles that has been followed over the years, namely that when a receiving state requests return, the request be honored unless another plan satisfactory to both states can be found."

In special situations the receiving state may feel compelled to ask the sending state to retake a parolee or probationer, even though the violations are relatively minor. It is suggested that in these cases the receiving state explain fully the pressures and special problems which make the continuance of supervision infeasible.

Section 4-111 (3): Article 3 requires that " [t] he decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state." See PPCAA Executive Council Rulings Section. Ruling No. 4 -Sending State's Refusal to Order Return of an Offender.

> The sending state shall reply to any violation report with either a decision or status report within 30 days of its receipt.

Section 4-112.
FORMS

The forms in reference to (1) Investigation Request; (2) Information When Subject is Sent to Receiving State; (3) Application for Compact Services and Agreement to Return; (4) Progress and Conduct Report; (5) Violation Report; and (6) Report of Arrival, are found in Chapter 4 and made part of these rules and regulations and are to be used for the purpose indicated. The Reply to Investigation Request Form, also found in Chapter 4, is optional.

Commentary

The objective in using standardized forms is to provide a degree of uniformity in the type and quality of information transmitted between states. Although there may be some minor differences in the format of forms used by the various states, every effort should be made to conform to the requirements of the rule regarding the use of forms. This is especially true where use of the Application for Compact Services and Agreement to Return is concerned as the language used

in this form must conform in every respect with the language adopted by the Administrators.

SECTION 500 RETAKING CASES FROM ANOTHER JURISDICTION

Section 5-101.
GENERAL LEGAL ASPECTS

A duly accredited officer of a sending state may at any time enter a receiving state and apprehend and retake any person on probation or parole after due process.

Commentary

Article 3 of the Compact was reinterpreted by the Supreme Court (1972 & 1973) in *Morrissey v. Brewer* and *Gagnon v. Scarpelli.* The Court expanded certain limited due process rights to parole and probation offenders prior to the return of the alleged violator to the receiving state. A preliminary probable cause hearing is required prior to return.

At the time of application for Compact services, a waiver of extradition is executed. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. Some states require an identity hearing prior to return of the alleged violator to the sending state.

Article 3 also prohibits the removal of an alleged violator from the receiving state if: 1) there remains pending within the state any criminal charges, 2) if the alleged violator is suspected of having committed any criminal offenses, 3) unless, the receiving state grants consent to remove the violator prior to discharge from prosecution or from imprisonment for such offense.

Section 5-102.
PROBABLE CAUSE HEARINGS

Morrissey v. Brewer and *Gagnon v. Scarpelli* mandate the holding of preliminary probable cause hearings in the receiving state prior to returning an alleged violator to the sending state.

Commentary

In the early 1970's the U.S. Supreme Court held in *Morrissey v. Brewer* and *Gagnon v. Scarpelli* that alleged parole and probation violators must be afforded limited due process rights upon arrest and confinement in the receiving state. The court held that an informal hearing is mandated to give assurance that the finding of parole or probation violation is based on verifiable facts and that a reasonably prompt inquiry is made by an impartial hearing officer near the place of alleged violation. The hearing is held to determine whether probable cause exists to believe that a parole or probation condition has been violated.

Section 5-103.
WAIVER OF PROBABLE CAUSE HEARINGS

Waiver of probable cause hearings by a parolee or probationer under the Compact against whom revocation proceedings have begun shall not be accepted unless said waiver shall also include an admission of violation of probation or parole, knowingly signed by the parolee or probationer unless such waivers are prohibited by the sending state.

Commentary

Historically, practices differ among states as to the conditions of and acceptability of waivers of probable cause hearings. Problems have occurred in substantiating parole/probation violations in the receiving state based upon waivers which do not include an admission of violation. To prevent the loss of violation action by the sending state, all waivers of probable cause hearings shall include a signed admission of violation by the parolee or probationer.

Section 5-104.
ON-SITE PROBABLE CAUSE HEARINGS

1) Parole or probation revocation actions against individuals transferred under the Interstate Compact shall include a preliminary probable cause hearing conducted in the receiving state when at the time of initiation of revocation the parolee or probationer was physically within a receiving state pursuant to transfer under the Compact.

2) Preliminary probable cause hearings shall be conducted in a timely and reasonable manner and may be held by courts of appropriate jurisdiction or by administrative officials who are neutral and detached from the specific proceedings as otherwise allowed by law.

3) Preliminary probable cause hearings shall be subject to the procedures of the receiving state where not in conflict with the Compact.

4) Any evidence acceptable in a preliminary probable cause hearing shall be sufficient when transferred to a sending state as part of the official record of the preliminary probable cause hearing for acceptance as evidence for consideration in a final revocation hearing in the sending state, notwithstanding that it may be otherwise insufficient or objectionable in the form in which it is transferred. See Probable Cause Hearing Information Form.

Commentary

The Adult Compact clearly mandates that policies and practices in the treatment of Compact offenders are to be governed by the receiving state. Therefore, to maintain uniformity in the administration of interstate preliminary probable cause hearings, the policies, procedures and practices of the receiving state shall prevail. Conflicts between states on the acceptability/admissibility of evidence are resolved through the execution of the Probable Cause Hearing Information Form signed by the parole or probation offender at the time of application for Compact services.

Section 5-105.
WAIVER OF EXTRADITION

No transfer shall occur under the Compact without a duly executed waiver of extradition signed by the parolee/probationer.

Commentary

1) Article (3) of the Compact greatly simplifies the procedure for interstate rendition of parolees and probationers. It means that the signatory states have agreed that extradition proceedings shall not be required when a sending state wishes to retake its parolee or probationer.

This agreement between the states is buttressed by an agreement signed by the parolee or probationer leaving the sending state for supervision in the receiving state. By signing this agreement (Form III of the Parole and Probation Forms - "Application for Compact Services and Agreement to Return") the offender waives any right to extradition proceedings in return for the privilege of interstate supervision and agrees to make no contest of "any effort by any state" to force return to the sending state upon demand.

Thus the states, with the consent of Congress, have expressly waived all of their legal requirements to obtain extradition of fugitives under the Compact - and the individual parolees or probationers have agreed - in advance and as a specific condition of their transfer - to waive their right to contest the effort of any state to return them to the sending state. The right of states to retake Compact cases without extradition has been challenged in court many times, but no court of last resort has ever handed down an unfavorable decision to the Compact.

2) The courts in recent years have ruled that if a parolee or probationer has signed a waiver of extradition as part of the agreement, extradition is not necessary. There are numerous relevant court cases (not one court of higher jurisdiction has ever ruled against this method of return). Quite to the contrary, the courts of higher jurisdiction, the U.S. 5th, 7th and 8th Circuits have ruled that a pre-signed waiver (without a Compact transfer) can be used and denied civil judgment against officials involved under USC Section 42, 1983. The courts have also ruled that:

(A) Prior waiver of extradition as a condition of parole is not an unreasonable or coerced condition. See *Pierson v. Grant*, 527 F.2d 161 (8th Cir.1975).

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(B) Prior waiver is enforceable if the offender had a "general knowledge and understanding" of the waiver. See *Forester v. California Adult Authority*, 510 F.2d 58 (8th Cir.1975).

(C) Extradition is not an exclusive remedy. See *Cook v. Kern*, 330 F2d 1003 (5th Cir.1964).

(D) It need only to establish identity of the offender and the authority of the retaking officer.

See Simmons on behalf of *Gra-V v. Lohman*, 228 E2d 824 (7th Cir.).

See PPCAA Executive Council Rulings Section, Ruling No. 5 - Refusal to Honor Waiver of Extradition.

Section 5-106.
THIRD PARTY STATE RETURN OF PAROLE/PROBATION VIOLATORS

When a parolee or probationer executes the Application for Compact Services and Agreement to Return Form (Form III) the individual also waives the right to extradition from any jurisdiction where such person may be found.

Commentary

There has been no difficulty experienced by probation or parole agencies in effecting the return of violators who are apprehended in the receiving state, particularly where the probationer or parolee has signed the Compact Form III. The courts have uniformly upheld the right of the state to retake in this situation without extradition and no reported case has been found to the contrary. The great weight of authority also holds that a parolee or probationer who has been released to supervision under the Compact in another state and absconds to a third party state may also be returned without formality of extradition proceedings. There are several court decisions upholding the return of an alleged violator from any other state under a pre-signed waiver. The courts have ruled that:

1. Prior waiver of extradition as a condition of parole is not an unreasonable or coerced condition;

2. Prior waiver is enforceable if the offender had "general knowledge and understanding" of the waiver;

3. Extradition is not an exclusive remedy;

4. There is need only to establish identity of the offender and the authority of the retaking officer.

Section 5-107.
RIGHT OF PAROLEES AND PROBATIONERS TO LEGAL PROCEEDINGS

No parolee or probationer under the Compact shall be denied the right to appeal to a court for the protection of individual rights.

Commentary

Parolees and probationers have sometimes made the claim that the Compact procedure for securing the return of interstate cases is in violation of the Fourteenth Amendment because it deprives them of liberty without due process of the law. This claim has always been rejected.

The following excerpt taken from the *Niederer v. Caty*, 240 N.W.2d 626 (Wis. 1976) case indicates the line of reasoning generally followed by the courts, in upholding the Compact's waiver provisions, "because a parolee is deprived of no federally protected right, constitutional or statutory, in not being afforded an extradition proceeding, there is no due process violation."

The Compact does not and cannot deny to a parolee or probationer the right to appeal to a court for the protection of individual rights. However, the rights of a parolee or probationer are not unlimited and must be balanced against the rights of society. Article 3 of the Interstate Compact under which supervision occurs states, "the decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving

state." Therefore, certain claims of violation of individual rights must be decided by the courts of the sending state rather than the courts of the receiving state.

The following is a summary of interpretations regarding the jurisdiction of courts of sending and receiving states over claims made by parolees and probationers:

(1) If the parolee or probationer claims to be the wrong person when the sending state attempts to retake the individual: by the very terms of the Compact the individual can apply in the asylum (receiving) state where the individual is found for a writ of habeas corpus to test "the identity of the person to be retaken."

(2) If the parolee or probationer claims that the officer sent to retake is not the duly accredited officer of the sending state: by the terms of the Compact, application can be made in the asylum (receiving) state for a writ of habeas corpus to test "the authority of the officer."

(3) If the parolee or probationer claims that conviction by the sending state was unjust or that the sentence received was disproportionate: the remedy is to appeal to the courts of the demanding (sending) state. There is no right to test innocence or guilt on habeas corpus in the receiving state.

(4) If the parolee or probationer claims that the sentence has already been served in full: the individual must appeal to a court of the sending state for a decision as to that person's status under the laws of the sending state.

(5) If the parolee or probationer claims that the violation for which retaking is underway is not serious enough to warrant return to the sending state: the court of the receiving state is relieved of jurisdiction by the express terms of the Compact which states, "the decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state."

(6) If the parolee or probationer contests the legality of the revocation: this is a question for the demanding (sending) state.

Section 5-108.
TRANSPORTATION OF CASES THROUGH OTHER STATES BY AGENTS OF THE SENDING STATE

Persons who are duly accredited officers of the sending state under this Compact, shall be permitted to transport prisoners through any and all states party to this Compact without interference.

Commentary

Article (4) of the Compact states that "only duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this Compact, without interference."

States may authorize appropriate officials within public or private agencies as official agent of the sending state for purposes of transporting offenders. Nothing in the Compact precludes a state from contracting with private transportation vendors for purpose(s) of transporting offenders across state boundaries.

Section 5-109.
RETAKING OFFENDERS DIRECTLY FROM STATE/FEDERAL CORRECTIONAL FACILITIES

Duly accredited agents of the sending state may assume custody directly from state/federal facilities provided that: 1) no detainer has been placed by the state in which the institution lies; 2) no extradition proceeding initiated by a 3rd state is pending; 3) that no identity hearing is required by the laws of the state in which the offender is incarcerated.

Commentary

Article 3 of the Compact provides for the waiving of extradition rights at the time of application. Unless local charges are pending or

unless another party state has initiated extradition proceedings, custody may be directly assumed by the sending state's agents at the place of confinements. In addition, some states require that an identity hearing be held in the state of confinement to establish the identity of the offender and of the sending state's agents.

SECTION 600 SUGGESTED RULES OF PRACTICE UNDER THE INTERSTATE REVOCATIONS HEARINGS AMENDMENT

NOTE: Section 600 contains recommended policies and general provisions for the implementation of interstate revocation hearings between signatory states. The contents of any sub-section contained herein is subject to the approval of the duly appointed Compact Administrators and/or designates representing the signatory states party to this amendment.

Section 6-101.
GENERAL LEGAL PROVISIONS

The service of administering interstate revocation hearings on a reciprocal basis is not a service provided for under any provision of the basic Compact. However, where Compact amendment exists and where a written contractual agreement exists between signatory jurisdictions, states may provide interstate revocation hearings pursuant to law and contractual arrangement. See recommended contract "Contract for Services Between (receiving state) and (sending state) for the implementation of the Revocation Hearings Amendment."

Commentary

When the Compact was effectuated in 1937, no provisions were made for authorities of signatory states to hold final revocation hearings for one another. While the Incarceration Amendment to the Compact (late 1960's) recognized and provided for interstate revocation hearings between signatory jurisdictions, its primary intent was to reincarcerate violators in the receiving sate. As a result, the Incarceration Amendment's applicability to modern field and correctional systems was questionable.

The Interstate Revocation Hearings Amendment provides the legal basis to permit signatory states to hold final revocation hearings for one another, reciprocally. The amendment legally assigns agent status to the receiving state's officials in the holding of final revocation hearings pursuant to this amendment. There are two separate Compact amendments governing interstate revocation

hearings - one statute governs parole revocation hearings and the other statute governs probation revocation hearings. States may opt to pass one or both amendments. In addition to the passage of the Compact amendment(s), signatory states shall enter into written contractual agreements. Said agreements shall provide the basis of how the states' staff conduct business between one another; what offender groups shall be eligible for services; and, which states' applicable laws and regulations shall prevail and govern the administration of final revocation hearings. Nothing in the amendments(s) or contained in any contractual agreement shall abrogate or revoke the sending states authority to review and approve a final revocation hearing recommendation made by the authorities of the receiving state.

Section 6-102.
ELIGIBILITY

Signatory states shall negotiate and agree via written contract as to the scope of offender eligibility.

Commentary

The U.S. Supreme Court clearly established that speedy trial rights do not apply to outstanding parole and probation violation detainers when an alleged parole or probation violator is serving an out of state term of imprisonment. *Nash v. Carchman* 473 U.S. 716, 105 S. Ct. 3401 (1985). Given the above holding, interstate Administrators may at their discretion decide on which offender groups may best be served by the hearing process provided for under the Interstate Revocation Hearings Amendment. It is strongly recommended that officials entering into contracts under this amendment clearly define the offender groups to be served.

Section 6-103.
AGREEMENT OF WAIVER - COMPACT OFFENDER

In order to partake in services provided under the Compact between states party to the Interstate Revocations Hearings Amendment, the parolee and/or probationer shall execute Form II, "Agreement of Waiver, Revocation Hearings Amendment" in conjunction with "The Application for Compact Services and Agreement to Return" form.

All documents shall be contained in the original transfer package compiled at the time of application for transfer.

Commentary

Compact services provide certain benefits to the offender group. In consideration of obtaining certain benefits derived from interstate transfer, the offender(s) must waive their rights to formal extradition and must realize and accept certain differences in the administration of parole/probation supervision between states. Where two states have adopted the Interstate Hearings Amendment and have entered into contractual arrangements under the amendment, the offender shall also acknowledge and agree to any differences in the administration of final revocation hearings between sending and receiving states. In addition, the offender must waive any right to a face-to-face revocation hearing in the sending state, and must waive any challenge to the type and character of information reports and documents presented and/or used in consideration against the offender during the final revocation process.

Section 6-104.
AGREEMENT OF WAIVER - NON-COMPACT OFFENDER

In order to partake in services provided under the Final Revocation Hearings Amendment and to obtain benefits derived there from, non-Compact offenders deemed eligible for revocation hearing by contractual agreement, shall effectuate Form IV- "Agreement of Waiver, Non-Compact Case"; Form IV shall be executed prior to the scheduling of any final revocation hearing within the receiving states. The offender must voluntarily execute a Form IV.

Commentary

Form IVs are only executed by non-Compact offenders who voluntarily request that a receiving state hold a final revocation hearing. Non-Compact offenders are only eligible for interstate revocation hearings under this Amendment(s) when signatory states agree to the eligibility of non-Compact offenders via formal contractual provision.

Section 6-105.
STANDARDS OF EVIDENCE

The type and character of information, reports and documents presented and/or entered into evidence to substantiate or dispel violation allegations brought against an offender under this amendment shall be accepted as legitimate standards of evidence by officials of the sending state provided that such documents are acceptable standards of evidence for revocation proceedings within the receiving state.

Commentary

The rule ensures that evidence presented and accepted at a final revocation proceeding in the receiving state be transferable as legitimate evidence when considered by the sending state.

NEW MEXICO CORRECTIONS DEPARTMENT

Gary E. Johnson, Governor Robert J. Perry, Cabinet Secretary John H. Shanks, Deputy Secretary Dona Wilpott, Deputy Secretary Mark Radosevich, Director

Probation & Parole Division Interstate Compact Unit PO Box 27116 Santa Fe, NM 87502-0116

October 30, 2001

Ms. Cheri Smith
NMCD# 5a 9 1
348 West Chandler Boulevard Chandler, AZ 85225

Dear Ms. Smith:

As per our previous phone conversations, the following is clarification on whet happened with your probation case materials.

The Interstate Compact Office received your parole case materials on November 28, 2000. Arizona Interstate Compact accepted the case for parole on January 10, 2001. You paroled directly to Arizona on February 7, 2001. At this point in time the Institution you were released from (NMWCF) should have notified the Probation Office in Farmington, New Mexico you were released on parole. This did not occur. On February 8, 2001, Mr. Arlin Chester, your parole officer in Arizona requested information regarding' your court ordered restitution payments. This request for information was filed and was not acted upon by the Interstate Compact Office. On October 5, 2001 you contacted my office. You stated that your parole officer had sent the above referenced correspondence and he had not received an answer. As I explained

Appendix L

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to you I found the request in your file and could not explain as to why it had not been acted upon by the Interstate Compact Administrator at that time. After reading through your file and discovering you had probation in addition to your parole, I contacted the Farmington Probation & Parole Office to find out who your probation officer was. I was informed that your probation officer was Linda Standerwick. I spoke to Ms. Standerwick and informed her that you were inquiring as to your restitution payments. She stated she had spoken to your parole officer in Arizona but she had not submitted any case materials for the probation supervision. I informed her that I would contact You and tell you to get a hold of her. She also informed me that the Assistant District Attorney in Farmington had filed a petition to revoke your probation. Ms. Standerwick stated she had nothing to do with the petition and that the ADA had initiated this action. It was at this point in time I called you and told you to contact Ms. Standerwick. After you spoke to Ms. Standerwick you called me and informed me what you had discussed. You asked me to contact Ms. Sandra Price, ADA in San Juan County. I did so at your request. I informed Ms. Price as to what had occurred with your probation and the miscommunication between the Probation Office, the Parole Office and Interstate Compact. Ms. Price informed me that she was not seeking revocation of your probation that she wanted clarification and a promissory note signed as to your restitution. I then contacted you and informed you as to Ms. Price's and my discussion. I then contacted Ms. Standerwick and asked her to submit case materials for your probation case.

I hope this information assists you.

Sincerely,

Celeste V. Casias

Celeste V. Casias
Deputy Interstate Compact Administrator

State of New Jersey

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July 9, 2002

Douglas Chiesa, Executive Assistant
New Jersey State Parole Board
P.O. Box 862
Trenton, New Jersey 08625

Re: #02-110 - Whether a family member's letter of support is sufficient for a mandatory acceptance case under the Uniform Act for Out-of-State Parolee Supervision, N.J.S.A, 2A;168-14 et. sea,

Dear Mr. Chiesa:

You have requested advice concerning whether a family member's letter of support constitutes a visible means of support for an out-of-state parolee requesting to have supervision transferred to New Jersey thereby *making the* parolee's case a mandatory acceptance case under the Uniform Act for Out-of-State Parolee Supervision, N.J.S.A., 2A:168-14 et. *seq. For*

the reasons *set forth below, the Parole* Board cannot refuse an offender who has *family in this state* and who has a letter of support from his wife.

By way of background, on March 12, 2001, a parolee from Louisiana requested to transfer his parole supervision *to* New Jersey pursuant to the Interstate Compact for the Supervision of Parolee and Probationers ("Compact"). As part of his application, the parolee submitted a letter from his wife who is a New Jersey resident, which indicates *that she will* financially support her husband. The Parole Board has denied acceptance of this case for supervision due to the belief that the parolee's wife's letter of support does not constitute a "visible means of support" pursuant *to the Compact. On July 30,* 2001, **New** Jersey rejected the parolee's *transfer* request on the basis of no employment. Louisiana resubmitted the transfer request and New Jersey again denied the transfer request on August 28, 2001 due to an absence of

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DOUGLAS K. **Wolfson Assistant Attorney *General***
Director

LAPS

STATE v. ROBINSON, 2001 WI App 224, *247 Wis.2d 988 635 N.W.2d 26*

State of Wisconsin, Plaintiff-Respondent,
v.
Edrick P. Robinson,

Defendant-Appellant.

COURT OF APPEALS OF WISCONSIN.

Case No. 00-1953.

Opinion Released: August 30, 2001.

Opinion Filed: August 30, 2001.

This opinion will not be published. Wis. Stat. Rule 809.23(1)(b)5.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶ 1. PER CURIAM.

Edrick Robinson appeals an order denying his motion for sentence credit. The issue is whether he is entitled to sentence credit for time spent confined in a Texas jail, on a pending Texas charge, while at the same time a Wisconsin probation violation warrant was also filed against him in Texas. We conclude that the record is insufficient to make this determination, and we reverse

and remand for further proceedings.

¶ 2. Robinson was convicted of a felony in Wisconsin in 1995. His sentence was imposed and stayed, and he was placed on probation. His probation supervision was then transferred to Texas. There, in February 1996, he was arrested for alleged possession of a stolen firearm. About a month later, based on that allegation, Wisconsin issued a "violation warrant." Robinson remained confined in Texas until March 1997. At that time, the prosecution dismissed the firearm charge because Robinson's brother confessed to the crime. Wisconsin released its violation warrant the next day, and Robinson was released from custody.

¶ 3. In 1999, Robinson's probation on the 1995 Wisconsin conviction was revoked for reasons unrelated to the Texas incident. He was then returned to prison in Wisconsin to serve the sentence imposed and stayed in 1995. Robinson requested sentence credit under Wis. Stat. § 973.155 (1999-2000)[fn1] for the time he spent in the Texas jail while he was the subject of Wisconsin's violation warrant. The Department of Corrections and the circuit court denied that request, and Robinson appeals.

¶ 4. Except for the fact that Robinson is seeking sentence credit for time spent in custody outside of Wisconsin, his situation is a fairly common one: a probationer is suspected of a new crime, arrested for the new crime, and then simultaneously placed on a probation hold. At that point, the defendant is being held in jail for two separate legal reasons. One of the cases Robinson relies on arose from precisely this situation. In ***State v. Boettcher***, 144 Wis.2d 86, 94-95, 423 N.W.2d 533 (1988), the court recognized that in these dual custody situations, the credit for the time in jail can be applied to either the sentence on the new charge, or the sentence that follows from revocation of the probation. The credit should be applied to whichever sentence is imposed first, but the defendant does not get credit on both sentences unless they are concurrent. ***Id.*** at 100.

¶ 5. In Robinson's case, unlike ***Boettcher,*** he was not convicted of a second crime, because the Texas charge was dismissed. However, Robinson argues that he should still receive sentence credit for his time in the Texas jail because the Wisconsin violation

warrant prevented his release on bail. Citing ***Boettcher***, he argues that the credit should be applied to the first (and only) sentence imposed on him, which was the sentence previously imposed and stayed in 1995.

¶ 6. On appeal, the State does not dispute Robinson's reading of ***Boettcher***, and gives us no reason to doubt that it remains good law. Instead, the State offers several arguments as to why the result should be different in this case because Robinson is seeking credit for confinement out of state.

¶ 7. The State first relies on a conclusion of the Wisconsin Jury Instructions Committee. The Committee has stated that a defendant is not in custody, for purposes of awarding sentence credit, when the defendant is detained in another state for an offense committed in that state, even if a Wisconsin warrant or detainer has also been filed. *See* Wis JI — Criminal SM-34A at 5-6 (2001). The Committee cites one case in support of this conclusion, ***State v. Rohl***, 160 Wis.2d 325, 466 N.W.2d 208 (Ct.App. 1991). Robinson argues that this case does not support the Committee's conclusion. We agree.

¶ 8. ***Rohl*** has some similarities to the present case. Rohl was a Wisconsin parolee who went to California and was held on new charges there. ***Id***. at 328. Based on the new charges, Wisconsin issued a "parole violation warrant." ***Id***. Rohl was convicted and imprisoned on the California charges, and received sentence credit there for his pre-sentence incarceration. ***Id***. Upon release from California, Rohl was returned to Wisconsin, his parole was revoked, and he was incarcerated in a Wisconsin prison. ***Id***. He sought sentence credit in Wisconsin for his California pre-sentence time, during which he had also been held pursuant to Wisconsin's parole violation warrant. ***Id***. at 328-29. This court held that Rohl was not entitled to that credit because he had already received that credit against his California sentence, and to give it to him again on the Wisconsin sentence would be contrary to ***Boettcher***'s rule that the credit can be given on only one of the sentences, unless the sentences are concurrent, which Rohl's were not. ***Id***. at 329-30, 332.

¶ 9. In its discussion of ***Rohl***, the Jury Instructions Committee

provides an accurate description of the opinion, including a statement that sentence credit was not given "because Rohl had received full credit in California." Wis JI — Criminal SM-34A at 16 n. 13. However, the Committee does not explain why it believes the ***Rohl*** opinion supports its conclusion that sentence credit should not be given when a defendant is held in another state and a Wisconsin warrant or detainer has been filed. It is clear to us, as stated in the Committee's own description of the opinion, that the ***Rohl*** decision was based on the fact that Rohl had already received the sentence credit in California, and *not* on the fact that he was held outside of Wisconsin, as the Committee's citation of ***Rohl*** implies. We decline to apply the Committee's conclusion to the case before us.

¶ 10. The State also relies on another statement by the Jury Instructions Committee. The Committee opined that a person is entitled to credit when detained in jail in another state, if that detention results "exclusively from a Wisconsin warrant or detainer." Wis JI — Criminal SM-34A at 5. The Committee determined that credit should not be granted when, for example, a Wisconsin parolee, already in custody in Illinois on Illinois charges, has a Wisconsin hold or warrant filed against him. Wis JI — Criminal SM-34A at 16 n. 8. The Committee stated: "This is consistent with the conclusion that filing a detainer against one already in custody in Wisconsin does not result in `custody' under § 973.155 on the charge which is the subject of the detainer." ***Id.*** The Committee's footnote then cited three Wisconsin cases in support.[fn2] However, none of those cases support the Committee's conclusion.

¶ 11. Only one of the Committee's citations needs to be discussed in detail, ***State v. Demars***, 119 Wis.2d 19, 349 N.W.2d 708 (Ct.App. 1984). In addition to ***Demars***, the Committee relies on ***State v. Nyborg***, 122 Wis.2d 765, 364 N.W.2d 553 (Ct.App. 1985), which is simply a straightforward application of ***Demars*** to similar facts, and on ***Rohl***, 160 Wis.2d at 330, which we have already discussed above.

¶ 12. In ***Demars***, the defendant was held in Fond du Lac County on a probation hold and on new charges. ***Demars***, 119 Wis.2d at 21. During that time, a separate criminal complaint was filed against

him in Winnebago County, and that county then filed a "detainer" requesting that Fond du Lac County detain him if he should post bond and the probation hold be lifted. ***Id.*** When Demars was eventually convicted of the Winnebago County offenses, he sought credit against those sentences from the date the "detainer" was filed against him. ***Id.*** at 22. We held that a defendant is not in custody in connection with an offense unless there is "the occurrence of a legal event, process, or authority which occasions, or is related to, confinement on the charge for which the defendant is ultimately sentenced." ***Id.*** at 26. We further held that Demars was not entitled to credit from the date of the "detainer" filed in Winnebago County because the "detainer" was not a document with any legal effect under Wisconsin law. ***Id.*** at 23-26.

¶ 13. The Jury Instructions Committee uses ***Demars*** to support its conclusion that when a person is being held on charges in another state, the simultaneous filing of a Wisconsin detainer does not entitle the person to sentence credit on the Wisconsin charge. However, the Committee's reading of ***Demars*** is unsupportably broad. Our conclusion in ***Demars*** did not apply to all documents labeled as detainers, but rather to *intrastate* detainers, which we concluded have no legal effect within Wisconsin, as a matter of Wisconsin law. An *interstate* detainer is a wholly different matter. Interstate detainers do have certain legal effects in Wisconsin, as set forth in Wis. Stat. §§ 976.05 and 976.06. Presumably they also have legal effects in the other states that have joined that multi-state agreement. We need not decide in this case whether the Committee is ultimately right in its conclusion on interstate detainers, because Robinson was subject to a violation warrant, not a detainer. Rather, our point is to emphasize that the Committee's conclusion cannot simply be extrapolated from ***Demars*** based on the use of the word "detainer." The real issue would be the specific legal effect of the interstate detainer, and whether it "occasions, or is related to, confinement on the charge for which the defendant is ultimately sentenced." ***Demars***, 119 Wis.2d at 26. Applying ***Demars*** in our current case, the key question becomes, what was the legal effect of the Wisconsin violation warrant that was filed against Robinson in Texas, and did it occasion or relate to his confinement?

¶ 14. The State briefly addresses that question on appeal. It argues

that the warrant had no legal effect, like the intrastate detainer in ***Demars***. The State asserts that the warrant was merely "a mechanism to let Texas know that Wisconsin wanted Robinson back" for possible revocation proceedings once the Texas charge was resolved. However, the State cites no legal authority or other explanatory information that allows us to determine the legal effect of an interstate probation violation warrant in Texas. Robinson argues that the violation warrant prevented his release on bail on the Texas charge. However, he too has not cited any legal authority on the relationship between bail and an interstate probation violation warrant under Texas law. And, the record on this appeal contains no factual information about what actually occurred in the Texas court on the subject of bail, and it does not contain the violation warrant itself.

¶ 15. The State acknowledges the possibility that we may conclude additional fact-finding is necessary to fully evaluate Robinson's claim for sentence credit, and that is indeed our conclusion. Additional evidentiary material, findings of fact, and legal analysis are necessary to resolve his claim.

¶ 16. In remanding to the trial court, it is necessary for us to clarify some points that are *not* appropriate for further consideration. On appeal, in responding to Robinson's argument that he was denied bail because of the violation warrant, the State noted that the record was silent as to the reason Robinson was not released on bail. The State suggested that the reason might have been that he was not able to make whatever amount of cash bail was set, or that he was denied bond altogether. Neither of these issues is relevant to the issue of sentence credit, for the following reasons.

¶ 17. It does not matter whether Robinson could not raise a required cash amount. Robinson directs our attention to ***Klimas v. State***, 75 Wis.2d 244, 249 N.W.2d 285 (1977). In that case, the court held that equal protection requires sentence credit to be given for pre-sentence custody of defendants who cannot make bail. ***Id.*** at 248-49. If such credit is not given, the indigent defendant who is convicted ends up serving a longer total sentence than a defendant who was able to make bail, because the indigent person actually serves the imposed sentence plus pre-trial incarceration. ***Id.*** We agree with Robinson that his financial inability to post bail would

have no bearing on his sentence credit determination.
¶ 18. And, even if a Texas court denied Robinson bail altogether, he may still receive sentence credit, because the test for sentence credit is not a "but for" test. To receive sentence credit, it is not necessary that the violation warrant was the only legal force keeping Robinson in custody. The State's brief argues that the test is whether Robinson would have been released "but for" the Wisconsin violation warrant. However, the State is wrong. If the test were "but for," in a dual custody situation a defendant would never receive sentence credit, because in each of the two cases the State would be able to argue that it was "the other case" that kept the defendant in custody. The "but for" test could never be satisfied when there are two separate legal reasons a defendant was held in custody. However, as we know from ***Boettcher***, discussed above, a defendant can indeed receive sentence credit when being held for multiple reasons. Therefore, even if the refusal of a Texas court to grant bail blocked Robinson's release, he can get sentence credit for that time, if the Wisconsin violation warrant "occasion[ed], or [was] related to, confinement on the charge" against which Robinson now seeks sentence credit. ***Demars***, 119 Wis.2d at 26.

¶ 19. On remand, the parties and the trial court may face certain practical difficulties in adding to the factual record. Ideally, Robinson would be able to provide a transcript of any Texas proceedings relating to his bail. But because that Texas charge was dropped, those transcripts were probably never prepared, assuming that the bail proceedings were even recorded in the first place. Robinson may face significant obstacles in attempting to obtain any Texas transcripts at this point. It is possible that the Texas courts retain some type of minute information that would state whether he was granted bail, and on what terms, but this information may not be enough to answer whether his release was affected by the violation warrant. Although these would be the best sources of information, in their absence, perhaps Robinson himself can testify about what he heard in Texas court, or what he was told by his attorney.

¶ 20. It may also be difficult for Robinson to obtain a copy of the violation warrant, but presumably the State has easier access to that document. Although the burden of proof is ordinarily on the defendant seeking sentence credit, we encourage the State to add

the violation warrant to the record if it can, in the interest of a speedy and efficient resolution of Robinson's claim.

¶ 21. **Finally, it may be necessary for the parties to research Texas law to determine what legal effect the Wisconsin violation warrant had on Robinson's release. As possible guidance, we note that like Wisconsin, Texas has adopted the Uniform Act for Out-of-State Parolee Supervision. Tex. Code Crim. Proc. Ann. art. 42.11 (Vernon 2001).[fn3] The uniform act is also enacted as Wis. Stat. § 304.13.**

¶ 22. In summary, we reverse and remand for the circuit court to take additional evidence, make findings as necessary, and reach a conclusion as to whether Wisconsin's violation warrant occasioned or was related to Robinson's confinement in the Texas jail.

By the Court. — Order reversed and cause remanded with directions.

[fn1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[fn2] We note that this citation appears to include a typographical error. The Committee directs the reader to the cases "cited in note 10, below." However, it appears that the correct cross-reference should be to note 15.

[fn3] Recent Texas legislation has affected the status of the Uniform Act in that state. *See* 2001 Tex. Sess. Law Serv. ch. 543 (Vernon) (ratifying the Interstate Compact for Adult Offender Supervision effective June 11,2001; repealing Tex. Code Crim. Proc. Ann. art. 42.11 (Vernon 2001) effective on the first anniversary of the effective date of the new Interstate Compact).

INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISON

BYLAWS

Article I
Commission Purpose, Function and By-laws

Section 1. Purpose.
Pursuant to the terms of the Interstate Compact for Adult Offender Supervision, (the "Compact"), the Interstate Commission for Adult Offender Supervision (the "Commission") is established to fulfill the objectives of the Compact, through a means of joint cooperative action among the Compacting States: to promote, develop and facilitate safe, orderly, efficient, cost effective and uniform transfer and supervision of adult offenders in the community who are authorized pursuant to the bylaws and rules of this Compact to travel across state lines both to and from each compacting state, and when necessary return offenders to the originating jurisdictions.

Section 2. Functions.
In pursuit of the fundamental objectives set forth in the Compact, the Commission shall, as necessary or required, exercise all of the powers and fulfill all of the duties delegated to it by the Compacting States. The Commission's activities shall include, but are not limited to, the following: the promulgation of binding rules and operating procedures; oversight and coordination of offender transfer and supervision activities in Compacting States; provision of a framework for the promotion of public safety and protection of victims; provision for the effective tracking, supervision, and rehabilitation of these

offenders by the sending and receiving states; equitable distribution of the costs, benefits and obligations of the Compact among the Compacting States; enforcement of Commission Rules, Operating Procedures and By-laws; provision for dispute resolution; coordination of training and education regarding the regulation of interstate movement of offenders for officials involved in such activity; and the collection and dissemination of information concerning the activities of the Compact, as provided by the Compact, or as determined by the Commission to be warranted by, and consistent with, the objectives and provisions of the Compact.

Section 3. By-laws.

As required by the Compact, these By-laws shall govern the management and operations of the Commission. As adopted and subsequently amended, these By-laws shall remain at all times subject to, and limited by, the terms of the Compact.

Article II
Membership

The Commission Membership shall be comprised as provided by the Compact. Each Compacting State shall have and be limited to one Member. A Member shall be the Commissioner of the Compacting State. Each Compacting State shall forward the name of its Commissioner to the Commission chairperson. The Commission chairperson shall promptly advise the Governor and State Council for Interstate Adult Supervision of the Compacting State of the need to appoint a new Commissioner upon the expiration of a designated term or the occurrence of mid-term vacancies.

Article III
Officers

Section 1. Election and Succession.
The officers of the Commission shall include a chairperson, vice chairperson, secretary and treasurer. The officers shall be duly appointed Commission Members, except that if the Commission appoints an Executive Director, then the Executive Director shall serve as the secretary. Officers shall be elected annually by the Commission at any meeting at which a quorum is present, and shall serve for one year or until their successors are elected by the Commission. The officers so elected shall serve without compensation or remuneration, except as provided by the Compact.

Section 2. Duties.
The officers shall perform all duties of their respective offices as provided by the Compact and

these By-laws. Such duties shall include, but are not limited to, the following:

a. *Chairperson.* The chairperson shall call and preside at all meetings of the Commission and in conjunction with the Executive Committee shall prepare agendas for such meetings, shall make appointments to all committees of the Commission, and, in accordance with the Commission's directions, or subject to ratification by the Commission, shall act on the Commission's behalf during the interims between Commission meetings.

b. *Vice Chairperson.* The vice chairperson shall, in the absence or at the direction of the chairperson, perform any or all of the duties of the chairperson. In the event of a vacancy in the office of chairperson, the vice chairperson shall serve as acting chairperson until a new chairperson is elected by the Commission.

c. *Secretary.* The secretary shall keep minutes of all Commission meetings and shall act as the custodian of all documents and records pertaining to the status of the Compact and the business of the Commission.

d. *Treasurer.* The treasurer, with the assistance of the Commission's executive director, shall act as custodian of all Commission funds and shall be responsible for monitoring the administration of all fiscal policies and procedures set forth in the Compact or adopted by the Commission. Pursuant to the Compact, the treasurer shall execute such bond as may be required by the Commission

covering the treasurer, the executive director and any other officers, Commission Members and Commission personnel, as determined by the Commission, who may be responsible for the receipt, disbursement, or management of Commission funds.

Section 3. Costs and Expense Reimbursement.
Subject to the availability of budgeted funds, the officers shall be reimbursed for any actual and necessary costs and expenses incurred by the officers in the performance of their duties and responsibilities as officers of the Commission.

Article IV
Commission Personnel

Section 1. Commission Staff and Offices.
The Commission may by a majority of its Members, or through its executive committee appoint or retain an executive director, who shall serve at its pleasure and who shall act as secretary to the Commission, but shall not be a Member of the Commission. The executive director shall hire and supervise such other staff as may be authorized by the Commission. The executive director shall establish and manage the Commission's office or offices, which shall be located in one or more of the Compacting States as determined by the Commission.

Section 2. Duties of the Executive Director.
As the Commission's principal administrator, the executive director shall also perform such other duties as may be delegated by the Commission or required by the Compact and these By-laws, including, but not limited to, the following:

a. Recommend general policies and program initiatives for the Commission's consideration;

b. Recommend for the Commission's consideration administrative personnel policies governing the recruitment, hiring, management, compensation and dismissal of Commission staff;

c. Implement and monitor administration of all policies programs, and initiatives adopted by Commission;

d. Prepare draft annual budgets for the Commission's consideration;

e. Monitor all Commission expenditures for compliance with approved budgets, and maintain accurate records of account;

f. Assist Commission Members as directed in securing required assessments from the Compacting States;

g. Execute contracts on behalf of the Commission as directed;

h. Receive service of process on behalf of the Commission;

i. Prepare and disseminate all required reports and notices directed by the Commission; and

j. Otherwise assist the Commission's officers in the performance of their duties under Article III herein.

Article V
Qualified Immunity, Defense, and Indemnification

Section 1. Immunity.
The Commission, its Members, officers, executive director, and employees shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising Out of or relating to any actual or alleged act, error, or omission that occurred, or that such person had a reasonable basis for believing occurred within the scope of Commission employment, duties, or responsibilities; provided, that any such person shall not be protected from suit or liability, or both, for any damage, loss, injury, or liability caused by the intentional or willful and wanton misconduct of any such person.

Section 2. Defense
Subject to the provisions of the Compact and rules promulgated there under, the Commission shall defend the Commissioner of a Compacting State, the Commissioner's representatives or employees, or the Commission, and its representatives or employees in any civil action seeking to impose liability against such person arising out of or relating to any actual or alleged act, error or omission that occurred within the scope of Commission employment, duties, or responsibilities or that such person had a reasonable basis for believing occurred within the scope of Commission employment, duties or responsibilities; provided, that the actual or alleged act, error, or omission did not result from gross negligence or intentional wrongdoing on the part of such person.

Section 3. Indemnification.
The Commission shall indemnify and hold the Commissioner of a Compacting State, his or her representatives or employees, or the Commission, and its representatives or employees harmless in the amount of any settlement or judgment obtained against such person arising out of or relating to any actual or alleged act, error, or omission that occurred within the scope of Commission employment, duties, or responsibilities or that such person had a reasonable basis for believing occurred within the scope of Commission employment, duties, or responsibilities; provided, that the actual or alleged act, error, or omission did not result from gross negligence or intentional wrongdoing on the part of such person.

Article VI
Meetings of the Commission

Section 1. Meetings and Notice.
The Commission shall meet at least once each calendar year at a time and place to be determined by the Commission. Additional meetings may be scheduled at the discretion of the chairperson, and must be called upon the request of a majority of Commission Members, as provided by the Compact. All Commission Members shall be given written notice of Commission meetings at least thirty (30) days prior to their scheduled dates. Final agendas shall be provided to all Commission Members no later than ten (10) days prior to any meeting of the Commission. Thereafter, additional agenda items requiring Commission action may not be added to the final agenda, except by an affirmative vote of a majority of the Members. All Commission meetings shall be open to the public, except as set forth in

Commission Rules or as otherwise provided by the Compact. Prior public notice shall be provided in a manner consistent with the federal Government in Sunshine Act, 5 U.S.C. § *552b,* including, but not limited to, the following: publication of notice of the meeting at least ten (10) days prior to the meeting in a nationally distributed newspaper or an official newsletter regularly published by or on behalf of the Commission and distribution to interested parties who have requested in writing to receive such notices. A meeting may be closed to the public where the Commission determines by two-thirds 2/3rds) vote of its Members that there exists at least one of the conditions for closing a meeting, as provided by the Compact or Commission Rules.

Section 2. Quorum.

Commission Members representing a majority of the Compacting States shall constitute a quorum for the transaction of business, except as otherwise required in these By-laws. The participation of a Commission Member from a Compacting State in a meeting is sufficient to constitute the presence of that state for purposes of determining the existence of a quorum, provided the Member present is entitled to vote on behalf of the Compacting State represented. The presence of a quorum must be established before any vote of the Commission can be taken.

Section 3. Voting.

Each Compacting State represented at any meeting of the Commission by its Member is entitled to one vote. A Member shall vote himself or herself and shall not delegate his or her vote to another Member. Members may participate in meetings by telephone or other means of telecommunication or electronic communication. Except as otherwise required by the

Compact or these By-laws, any question submitted to a vote of the Commission shall be determined by a simple majority.

Section 4. Procedure.
Matters of parliamentary procedure not covered by these By-laws shall be governed by Robert's Rules of Order.

Article VII
Committees

Section 1. Executive Committee.
The Commission may establish an executive committee, which shall be empowered to act on behalf of the Commission during the interim between Commission meetings, except for rulemaking or amendment of the Compact. The Committee shall be composed of all officers of the Interstate Commission, the chairpersons of each committee, and the regional representatives and the ex-officio victims' representative to the Interstate Commission. The procedures, duties, budget, and tenure of such an executive committee shall be determined by the Commission. The power of such an executive committee to act on behalf of the Commission shall at all times be subject to any limitations imposed by the Commission, the Compact or these By-laws.

Section 2. Other Committees.
The Commission may establish such other committees as it deems necessary to carry out its objectives, which shall include, but not be limited to Finance Committee, Rules Committee, Compliance Committee, Information Technology Committee, and Training, Education and Public Relations Committee. The composition, procedures, duties, budget and tenure of such committees shall be determined by the Commission.

Article VIII
Finance

Section 1. Fiscal Year.
The Commission's fiscal year shall begin on July 1 and end on June 30.

Section 2. Budget.
The Commission shall operate on an annual budget cycle and shall, in any given year, adopt budgets for the following fiscal year or years only after notice and comment as provided by the Compact.

Section 3. Accounting and Audit.
The Commission, with the assistance of the executive director, shall keep accurate and timely accounts of its internal receipts and disbursements of the Commission funds, other than receivership assets. The treasurer, through the executive director, shall cause the
Commission's financial accounts and reports including the Commission's system of internal controls and procedures to be audited annually by an independent certified or licensed public accountant, as required by the Compact, upon the determination of the Commission, but no less frequently than once each year. The report of such independent audit shall be made available to the public and shall be included in and become part of the annual report to the Governors, legislatures, and judiciary of the Compacting States. The Commission's internal accounts, any workpapers related to any internal audit, and any workpapers related the independent audit shall be confidential; provided, that such materials shall be made available: i) in compliance with the order of any court of competent jurisdiction; ii) pursuant to such reasonable rules as the Commission shall promulgate; and iii) to any Commissioner or of a Compacting State, or their duly authorized representatives.

Section 4. Public Participation in Meetings.
Upon prior written request to the Commission, any person who desires to present a statement on a matter that is on the agenda shall be afforded an opportunity to present an oral statement to the Commission at an open meeting. The chairperson may, depending on the circumstances, afford any person who desires to present a statement on a matter that is on the agenda an opportunity to be heard absent a prior written request to the Commission. The chairperson may limit the time and manner of any such statements at any open meeting.

Section 5. Debt Limitations.
The Commission shall monitor its own and its committees' affairs for compliance with all provisions of the Compact its rules and these By-laws governing the incursion of debt and the pledging of credit.

Section 6. Travel Reimbursements.
Subject to the availability of budgeted funds and unless otherwise provided by the Commission, Commission Members shall be reimbursed for any actual and necessary expenses incurred pursuant to their attendance at all duly convened meetings of the Commission or its committees as provided by the Compact.

Article IX
Withdrawal, Default, and Termination

Compacting States may withdraw from the Compact only as provided by the Compact. The Commission may terminate a Compacting State as provided by the Compact.

Article X
Adoption and Amendment of By-laws

Any By-law may be adopted, amended or repealed by a majority vote of the Members, provided that written notice and the full text of the proposed action is provided to all Commission Members at least thirty (30) days prior to the meeting at which the action is to be considered. Failing the required notice, a two-third (2/3rds) majority vote of the Members shall be required for such action.

Article XI
Dissolution of the Compact

The Compact shall dissolve effective upon the date of the withdrawal or the termination by default of a Compacting State which reduces Membership in the Compact to one Compacting State as provided by the Compact.

Upon dissolution of the Compact, the Compact becomes null and void and shall be of no further force and effect, and the business and affairs of the Commission shall be wound up. Each Compacting State in good standing at the time of the Compact's dissolution shall receive a pro rata distribution of surplus funds based upon a ratio, the numerator of which shall be the amount of its last paid annual assessment, and the denominator of which shall be the sum of the last paid annual assessments of all Compacting States in good standing at the time of the Compact's dissolution. A Compacting State is in good standing if it has paid its assessments timely.

STATE OF NEW MEXICO SAN JUAN COUNTY
DISTRICT COURT

STATE OF NEW MEXICO, **Plantiff**

V,

Cheri D. Smith _____. Defendant

No, CR-98-00899-1

SUBPOENA

SUBPOENA FOR APPEARANCE OF PERSON FOR [x] records

TO: US West Communication - Farrington, P14 87401

YOU ARE HEREBY COMMANDED TO APPEAR as follows:

7450 East Main

PLACE: , Farrington. NM **82401** DATE: -_____- -

t499 TIME: 1-:w p, _____ - (a.m..) (p.m..)

to testify in the above case. - to be transferee to A.M., Investigator - Darryl Harris

FAX

YOU ARE ALSO COMMANDED to bring *with you the following* document (s) or object (s)

All phone records establishing, terminating or expanding telephone or fax lines for Cheri Smith

or Red Apple Valley Insurance 1994 to Present . *#'s .5O5 334-1445 and 505-334-1964*

IF YOU DO NOT COMPLY WITH THIS SUBPOENEA you may be held in contempt of court and punished by fine or imprisonment

Attorney

Appendix P

The district court compiles *with, the* Americans *with* Disabilities Act, It is *counsel's* or a pro se party's obligation to notify the clerk of the court at leap five (S) days before a" hearing of the anticipated attendance of a disabled person so that appropriate accommodations can be made, The court must be notified a. to the appropriate *type p3* of accommodation which will be necessary.

Additionally, it is counsel's or pro se party's obligation to notify the clerk of the court at least five (5) days in advance of any hearing for which a non-English language interpreter will be required,

RETURN FOR Completion BY

SHERIFF, DEPUTY OR OTHER PERSON

I certify that on the. _____ day of _____

_____, in_____

County, I served this subpoena on_____

by delivering to the person named a copy of *the subpoena.*

Name and Title

STATE OF NEW MEXICO
SAN JUAN COUNTY DISTRICT COURT

STATE OF NEW MEXICO, Plaintiff

No. CR-98-00899-1

V.

Cheri D. Smith _____ , Defendant

SUBPOENA

SUBPOENA FOR APPEARANCE OF PERSON FOR
[X] RECORDS [ ] TRIAL [ ] GRAND JURY

TO: US West Communication- Farmington, NM 87401

YOU ARE HEREBY COMMANDED TO APPEAR as follows:
7450 East Main
PLACE: Farmington, NM 87401 _____ DATE: June 4 , , 1999
TIME: 5:00 PM (a.m.) (p.m.) to testify in the above case.
RECORDS to be faxed to ADA Investigator- Darryl Harris

YOU ARE ALSO COMMANDED to bring with you the following document (s) or object (s)

All notes and credit information related to account number 5053341964
IF YOU DO NOT COMPLY WITH THIS SUBPOENA you may be held in contempt of court and punished by fine or imprisonment.

F *A#*
4916roel" ***"I***

Attorney

The district court complies with the Americans with Disabilities Act. It is counsel's or a pro se party's obligation to notify the clerk of the court at least five (5) days before any hearing of the anticipated attendance of a disabled person so that appropriate accommodations can be made. The court must be notified as to the appropriate type of accommodation which will be necessary.

Additionally, it is counsel's or pro se party's obligation to notify the clerk of the court at least five (5) days in advance of any hearing for which a non-English language interpreter will be required.

RETURN FOR COMPLETION BY SHERIFF, DEPUTY OR OTHER PERSON

I certify that on the _____day of _____, _____,
in _____
County, I served this subpoena on_____
by delivering to the person named a copy of the subpoena.

Name and Title

STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff

V.

CHERI SMITH, Defendant

DISTRICT COURT

SAN JUAN COUNTY

No. CR-98-935-1

SUBPOENA DUCES TECUM

TO: Wells Fargo Bank of New Mexico Attention: Custodian of Records. P. 0. Box 29728. Phoenix. AZ 85 38

SUBPOENA TO DELIVER:

Please provide all statements for account # 1350304811. in *the* name of Cheri D. Smith or another. from March 1. 2001 until the present.

YOU ARE HEREBY COMMANDED TO DELIVER THE REQUESTED ITEMS TO THE FOLLOWING ADDRESS ON OR BEFORE: As soon as possible.

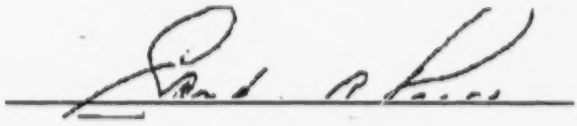
DELIVER TO: Please contact Trees Cash at (505) 325-7555 when records are ready. If possible please fax to (505) 327-7579

IF YOU DO NOT COMPLY WITH THIS SUBPOENA you may be held in con pt of court and punished by fine or imprisonment. The district court complies with the Americans with Disabilities Act. It is counsel's or a prose party's obligation to notify the clerk of the court at least five (5) days before any hearing of the anticipated attendance of a disabled person so that appropriate accommodations can *be* made. The court must be notified as to *the* appropriate type of accommodation which will be *necessary.*

Additionally, it is counsel's or pro se parry's obligation to notify the clerk of the court at least five (5) days in advance of any hearing for which a non-English language interpreter will be required.

RETURN OF SERVICE

I hereby certify that the foregoing subpoena was/was not served on. the party identified above by
personal service at_____
This Day of



NOTE:
Paper No.:

Deputy/Police Officer/Process Server Officer No.:

(2)

Supreme Court
FILED

No. 03152 9 FEB 2 - 2004

OFFICE OF THE CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

Cheri Smith,
Petitioner

Vs.

State of New Mexico

Respondent

SUPPLEMENT TO APPENDICES
FOR
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT
FOR THE OF
STATE OF NEW MEXICO
PETITION FOR WRIT OF CERTIORARI

CHERI SMITH
Petitioner, Pro Se
P O Box 10877
Tempe, AZ 85284
480-710-0947

No._____01-_____

IN THE SUPREME COURT

OF THE UNITED STATES

Cheri Smith,
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Respondent

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
COURT OF APPEALS OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,

Patricia R. Wallace

vs.
CHERI SMITH,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
John A. Dean, Jr., District Judge

STATE OF NEW MEXICO,

No. 23,725

Patricia A. Madrid — Attorney for Appellee
Attorney General
Santa Fe, New Mexico

Cheri Smith
Tempe, AZ — Pro se Appellant

MEMORANDUM OPINION

ALARID, Judge.

Defendant, pro se, filed a notice of appeal in this Court on January 10, 2003, and a docketing statement on the same date. [RP 509, 511] The notice of appeal appeals from the "Orders entered in the above entitled cause," but does not attach any copies of the orders appealed from. [See Rule 12-202(B) NMRA 2003; RP 509]

On March 26, 2003, Defendant filed an amended notice of appeal and amended docketing statement in this Court. [RP 558, 566] The amended notice of appeal states that Defendant is appealing "from the Motions filed in the above-entitled case," which were filed more than 30 days ago and therefore "deemed denied." [RP 558] The amended notice does not attach a copy of the motions appealed from. See Rule 12-202(B). This Court's calendar notice proposed summary dismissal for lack of a final order. Defendant has filed a memorandum in opposition and a motion to compel due process. Unpersuaded by the memorandum in opposition, we dismiss the appeal for lack of a final order.

DISCUSSION

1. Motion to Compel Due Process. The motion requests that this Court protect Defendant from the actions of the 11th Judicial District Court, which, Defendant alleges, are against Defendant's constitutional rights to due process, notification, and, according to Defendant, constitute perjury by the district court Judge and the prosecuting attorney. [Motion, 1-2] This Court does not have jurisdiction to specifically compel the district court to perform actions such as Defendant requests in the motion. See NMSA 1978, Section 44-2-3 (1953) ("The district court has exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction"). We, therefore, express no opinion on the merits of the allegations set forth in the motion.

Summary Dismissal for Lack of a Final Order.

In the memorandum, Defendant asserts that the summary of procedural facts set forth in the calendar notice is incomplete. [MIO 1-2] The purpose of the summary of facts set forth therein, however, was to point out that the substance of the action before the district court, which consists of the State's motions to revoke Defendant's probation [RP 330, 355, 415], have not yet been ruled upon, making Defendant's appeal to this Court premature. As such, as discussed in the calendar notice, this Court does not have jurisdiction to rule on the merits of the appeal as set forth in the docketing statement and Defendant's arguments raised in the memorandum. We remain persuaded that the operative facts, for the purpose of this Court's jurisdiction, are as set forth in the calendar notice. By arguing the merits of the appeal, Defendant's memorandum does not persuade us that the appeal is not premature.

A. Factual and Procedural Background.

Defendant was convicted, after a jury trial, of one count of embezzlement, one count of fraud, and once count of acting as an insurance consultant with a license while her license was suspended. [RP 183] Defendant appealed her conviction to this Court and a memorandum opinion was issued by this Court on November 20, 2000, Ct. App. No. 21,129. [RP 309] The opinion affirmed the district court's judgment, except for her conviction for acting as an insurance consultant without a license, which was reversed. [RP 317]

On September 28, 2001, the State filed a motion to revoke Defendant's probation. [RP 330] The State filed an amended motion to revoke probation, a second amended motion to revoke probation, and a third amended motion on October 26, 2001, December 6.2001, and on June 6, 2002, respectively. [RP 355, 415] Meanwhile, Defendant filed a motion to quash subpoena duces tecum relating to the State's subpoena of Defendant's bank records, which was denied by the district court on July 25, 2002. [RP 463] A hearing on the State's motion to revoke probation was set for September 19, 2002, and continued to October 25, 2002, then continued to November 20, 2002, and apparently continued to January 14, 2003, when Defendant did not appear and a bench warrant for her arrest was filed. [RP 465, 468, 470, 481, 534]

On October 31, 2002, the district court entered an order concerning filings by a non-party, which ordered Defendant's husband Richard Smith, who is not a party to this case, not to file any further pleadings, except filings dealing with issues of intervention. [RP 482] Also on October 31, 2002, the district court entered an order upon the issue of the admissibility of Defendant's bank records in her pending probation revocation hearing. [RP 484] In that order the district court determined that the bank records were "not only

22 relevant but essential to the Court in determining whether Defendant violated her 23 probation by failing to pay restitution as ordered by the Court." [Id.]

On November 18, 2002, Defendant's husband Richard Smith filed a notice of appeal to this Court. [RP 486] As a result of Richard Smith's appeal, this Court issued a memorandum opinion, affirming the district court's order that prohibited Mr. Smith *from "further* interjecting himself into the proceeding and alleging violations that have no legal remedy in this context." [RP 544, 545]

Meanwhile, Defendant filed a notice of appeal in this Court on January 10, 2003, and a docketing statement on the same date. [RP 509, 511] The notice of appeal appeals *from* the "Orders entered in the above entitled cause," but does not attach any copies of the orders appealed from, [See Rule 12-202(B) NMRA 2003; RP 509] On January 14, 2003, the district court filed a bench warrant for Defendant's arrest for failing to appear at the probation revocation hearing. [RP 534] Defendant's counsel filed a motion to withdraw, which was granted by the district court. [R 536, 538] Defendant then filed a motion to quash bench warrant on January 21, 2003. [RP 539] The motion asked the district court to set a

hearing on the motion to quash bench warrant. [RP 540] Meanwhile, it appears that Defendant filed a lawsuit in federal district court against the district court judge in this case, which was dismissed with prejudice. [RP 547-551]

On March 26, 2003, Defendant filed an amended notice of appeal and amended docketing statement in this Court. [RP 558, 566] The amended notice of appeal states that Defendant is appealing "from the Motions filed in the above-entitled case, which were filed more than 30 days ago and therefore "deemed denied." [RP 558] The amended notice does not attach a copy of the motions appealed from. See Rule 1.2-202(B).

B. Appeals from Final Judgments. It is clear from the record summarized in detail above, that the case before us, at this time, does not concern the underlying judgment and sentence which Defendant already appealed to this Court and which resulted in a Memorandum Opinion affirming her convictions in part and reversing in part. Rather, the case before us at this time concerns whether Defendant has violated the terms and conditions of her probation. As such, this case began with the State's three motions to revoke Defendant's probation. The record reflects that the district court has not yet

ruled on whether the State is entitled to revoke Defendant's probation. See, e.g., State v. Garcia, 99 N.M. 466, 471, 659 P.2d 918, 923 (Ct. App. 1983) (stating that in a criminal case, the final

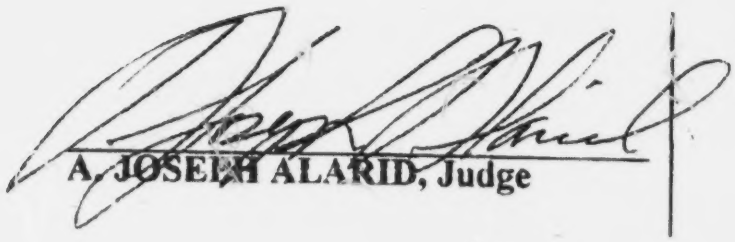
judgment is the judgment and sentence or an order dismissing all the charges against the defendant.).

The orders and motions Defendant purports to appeal from, presumably, concern the district court's order to allow the admission of Defendant's bank records as relevant and essential to the probation revocation determination and Defendant's motion to quash the bench warrant for not appearing at the hearing on the motions to revoke Defendant's probation. These orders and motions, however, appear not to be a final determination of whether Defendant's probation should be revoked. In fact, it appears that the hearing on the State's motions to revoke Defendant's probation has not yet taken place with Defendant in attendance. See Rule 12-201(A)(2) NORM 2003; see also, e&., Clancey v. Gooding, 98 N.M. 252, 254, 647 P.2d 885, 887 (Ct. App. 1982) (stating that, "New Mexico courts have repeatedly held that a judgment or order is not final unless all issues of law and of fact necessary to be determined were determined, and the case has been completely disposed of to the extent the court has power to dispose of it.").

CONCLUSION

We dismiss the appeal for lack of a final order and remand to the district court for further proceedings.

IT IS SO ORDERED.

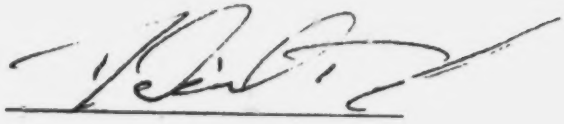


A. JOSEPH ALARID, Judge

WE CONCUR:

ES J.WECHSLER, Chief Judge

RODERICK T. KENNEDY, Judge



IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO	)	
	)	
Plaintiff/Appellee	)	Case No. CR 98-935-1
	)	Court of Appeals Case 23, 725
vs.	)	
	)	Court Div I San Juan Cnty, N. M.
CHERI SMITH	)	
	)	Honorable William C Birdsall
Defendant/Appellant	)	District Judge
	)	

AMENDED DOCKETING STATEMENT

Dated this
26th day of
March, 2003

By: Cheri Smith

Cheri Smith
P O Box 10877
Tempe, AZ 85284
crsmith82@yahoo.com

Appendix R

1. **Statement of the nature of the proceedings.** The Appellant was tried in 11th Judicial District Court August 1999. The Appellant was convicted of Embezzlement and Fraud, both Third Degree Felonies, and a Misdemeanor Charge of Acting as an Insurance Consultant without a License. Appellant was sentenced February 07, 2000, Judgment & Sentence. On February 23, 2000, Appellant turned herself in to serve her sentence. On February 23, 2000 Notice of Appeal was given. The Court of Appeals final disposition of the case was November 17, 2000. The Appellate Court's Order instructs 11th Judicial District Court to dismiss the Misdemeanor Charge of Consulting without a License. February 7, 2001 Appellant is released from New Mexico Woman's Correctional Facility, with Parole approved through Interstate Compact to the State of Arizona. Interstate Compact Cooperative Report dated February 08, 2001 was sent to New Mexico Adult Parole & Probation/New Mexico Interstate Compact/ Department of Corrections. On November 13, 2001, one year after the Memorandum Opinion is signed, District Court is advised in a hearing (Motion to Revoke Probation) that the directive from the Court of Appeals had not been done. The Court states,

"That they had that and that it had been, he thought." The State District Attorney states, "It had been done." On November 15, 2001, the Court adding six months, which the Court of Appeals had directed the Court to dismiss, signs an Order of Probation. The State filed a Motion to Revoke Probation on September 28, 2001 The New Mexico Adult Parole & Probation Department did no referral, nor did Arizona Adult Parole & Probation Department. The Appellant filed a response to the Motion pro se. An Amended Judgment & Sentence is done December 2001. Appellant files motion for Court appointed Counsel. Appellant & Husband found out that the State has issued various subpoenas to other parties, without serving Appellant or her husband, and obtaining personal information, from their Landlord, Wells Fargo, and U.S. West before trial in the above entitled case. The State of New Mexico (District Attorney) served a Subpoena on Wells Fargo Bank on October 30, 2001 to obtain Bank records of Richard Smith, who is primary owner of account; Cheri Smith is authorized signer on said account. This was done contrary to NMSA 1978 §14-7-1, NMRA 5-103, and N.M. Constitution Article II §10. Counsel of Appellant advises the Court of

violation of illegal search and seizure in May 3, 2002 hearing. The Court allows the State to issue another subpoena (July 25,2002) to obtain records already obtained illegally as well as current information knowing what is there. State District Attorney commits perjury in the 11th Judicial Court on November 13, 2001. State District Attorney committed Deceit upon the Supreme Court in the request for extension to try Appellant. Court never hears motions that have been filed Appellant Pro Se, including Motion to Dismiss, filed on November 13, 2001 (RP 385). Appellant has returned to the Court 10 times over 16 months for the Motion to Revoke (RP 330) (Amended Three Times) filed by State District Attorney on September 28, 2001. The State District Attorney has called Appellant's Employers past and present to have them testify in the above matter, causing the Appellant to lose her position. These communications were held without the presence of Appellant or Counsel.

Appellant's husband filed appeal (23,600) to Court of Appeals for review of the illegal search and seizure of his bank records, on November 16, 2002. Docketing Statement was filed in District Court on November 19, 2002 (RP 488) and on

November 20, 2002 the Court had a hearing after being duly informed of New Mexico Court of Appeal Case 23,600. In the November 20, 2002, the Court allowed information obtained from said bank records into the records, the basis of said appeal. Court then verbally finds that Appellant violates her probation. Appellant then files an Appeal (23,725) and The Notice of Appeal and Docketing Statement are filed in the 11th Judicial District Court, on January 10, 2003 (RP/SRP 509). The 11th Judicial District Court then has a hearing on January 14, 2003 which the Appellant is not aware of, and the Court issues a warrant for her arrest. The Appellant files Motion to Quash, but the 11th Judicial District Court does not hear, thus it is deemed denied.

2. **Jurisdiction.** The Amended Notice of Appeal is timely filed. This Amended Docketing Statement is filed within thirty (30) Day of the Amended Notice of Appeal per N.M.R.A. 12-208. Motions filed in the above entitled case, which have not been heard or ruled on by the 11th Judicial District Court, filed more than 30 days ago, therefore deemed denied. Double jeopardy that the Court has placed Defendant under can be appealed at any time.

3. **Statement of the case.** The State of New Mexico took Appellant before a Grand Jury to obtain an indictment, November 1998. Appellant appeared before Judge Harrison on November 16, 1998. Appellant was released with a $50,000 bond. Judge George Harrison is recused as Judge on November 25, 1998 (RP 9) reassigned to Larry Thrower. Mel O'Reilly was hired as Counsel entering his appearance December 2 1998. Motion filed to Compel Disclosure (RP12), Request for Grand Jury Proceedings (RP 14) Appellant was taken before grand jury October 23, 1998, and November 6, 1998 (RP 1-RP 3). The first grand jury resulted in Charges filed in case 98-899-6; the second Grand Jury resulted in Charges filed in case 98-935-1. Case 98-899-6 was dismissed due to 5-604, time element, June 25, 1999. The State added misdemeanor charges from CR 98-899-6 to the second Case No CR98-935-1. The charges in both cases were from the continuing act. The Appellant was tried in 11th Judicial District Court August 1999. The Appellant was convicted of Embezzlement and Fraud, both Third Degree Felonies, and a Misdemeanor Charge of Acting as an Insurance Consultant

without a License. Appellant was sentenced February 07, 2000, Judgment & Sentence. On February 23, 2000, Appellant turned herself in to serve her sentence. On February 23, 2000 Notice of Appeal was given. The Court of Appeals final disposition of the case was November 17, 2000. The Appellate Court's Order instructs 11th Judicial District Court to dismiss the Misdemeanor Charge of Consulting without a License. February 7, 2001 Appellant is released from New Mexico Woman's Correctional Facility, with Parole approved through Interstate Compact to the State of Arizona. Interstate Compact Cooperative Report of February 8, 2001 was sent to New Mexico Adult Parole & Probation/New Mexico Interstate Compact/ Department of Corrections. Terms & Conditions imposed by Arizona are included The Interstate Compact Cooperative Report addressed the Judgment & Sentence order of February 7, 2000. The Interstate Compact allows the Conditions of Parole & Probation to be addressed by the receiving state; the sending state shall conform to these changes. Arizona Interstate Compact Adult Parole & Probation did, as the Law requires, New Mexico Interstate Compact Deputy Administrator verifies that this was done, and that New

Mexico could not violate my Probation. New Mexico wanted a promissory note signed for restitution, however, this was not presented to Appellant until November 06, 2001, nor was the Order of Probation, when it was Appellant was told she had to sign. The State of New Mexico (District Attorney) filed a Motion to Revoke Probation on September 28, 2001, prior to issuance of Order of Probation, against Appellant in this criminal case, and the Court issued a summons. Neither The New Mexico Adult Parole & Probation Department/ Interstate Compact or The Arizona Adult Parole & Probation Interstate Compact did any referral. Parole and Probation has been granted to the State of Arizona, Parole February 7, 2001 and Probation was completed January 2003. The State of New Mexico (District Attorney) served a Subpoena on Wells Fargo Bank on October 30, 2001 to obtain Bank records of Richard Smith, who is primary owner of account; Cheri Smith is authorized signer on said account. This was done contrary to NMSA 1978 §14-7-1, NMRA 5-103, and N.M. Constitution Article II §10. Subpoena was not served to Appellant or Richard Smith. Wells Fargo sent said records on November 7, 2001 to State of New Mexico District Attorney. Wells Fargo

notifies Appellant and her husband, after the records were sent. State of New Mexico has filed three Amended Motions to Revoke Probation (RP 330 , RP 355, RP 432)) and Judgment and Sentence. Appellant filed Motion to Quash Illegal Search & Seizure of Bank records on November 13, 2001. On November 13, 2001, The Court was advised of the Illegal Search & Seizure of Bank Records, as well as the perjury of the District Attorney. On November 9, 2001 Appellant files for Appointment of Counsel (RP 361). On November 15, 2001, an Order of Probation is signed by the Court adding six months, which the Court of Appeals had directed the Court to dismiss, and in the Order of Probation includes the conditions, which Arizona said would not be enforced, thus putting Appellant in harms way, and violating Federal Law of Interstate Compact *4 U.S.C. § 112* for Adult Offender Supervision. Appellant borrows funds to hire Counsel on November 26, 2001. May 3, 2002 State of New Mexico presents a copy of bank records to Counsel of Appellant and plans to introduce records that were obtained in violation of to U.S. Constitution, N.M. Constitution Article II, Section 10, and contrary to NMSA 1978 §14-7-1, NMRA 5-103, and

N.M. Constitution Article II §10. The Court does not hear Motion to Quash until June 6, 02. In the hearing of June 6, 2002 The State gives verbal notice of second Subpoena that is going to be served on Wells Fargo to correct prior Illegal Search & Seizure of Bank Records already knowing what is said account since they were obtained illegally previously. Appellant's Counsel stated that the evidence obtained illegally could not be used. The Court instructed The State of New Mexico, the moving party that notice is sent to Richard Smith and Appellant is served to obtain records. On June 11, 2002, Appellant and Richard Smith received a subpoena. On June 21, 2002 a Motion and Amended Motion was filed to Quash Subpoena Duces Tecum. On July 10, 2002, a hearing was held in 11th Judicial District for the second Subpoena Duces Tecum. On July 26, 2002, Richard Smith notified Wells Fargo of Motion to Quash Subpoena Duces Tecum had been filed. On July, 27, 2002 with out Richard Smith receiving a copy of the Order issued by The Court on July 25, 2002 said Bank Records are again sent to the State of New Mexico violating The U.S. Constitution, N.M. Constitution Article II, Section 10. Richard Smith files a motion to Quash Illegal Search & Seizure of

Bank Records on October 15, 2002 and an Affidavit in support thereof. On October 31, 2002 the Court files "Order Concerning Filings by a Non-Party", and "Order Upon In Camera Review of Appellant's Bank Records."

On November 16, 2002 Richard Smith filed appeal (23,600) to New Mexico Court of Appeals for review of the illegal search and seizure of his bank records. Docketing Statement was filed in District Court on November 19, 2002 (RP 488) and on November 20, 2002 the Court had a hearing after being duly informed of New Mexico Court of Appeal Case 23,600. In the November 20, 2002, the Court allowed information obtained from said bank records into the records, the basis of said appeal. Court then verbally finds that Appellant violates her probation. The conditions that Arizona said would not be enforced. Appellant then files an Appeal (23,725) and The Notice of Appeal and Docketing Statement are filed in the 11th Judicial District Court, on January 10, 2003 (RP/SRP 509).

The 11th Judicial District Court then has a hearing on January 14, 2003 which the Appellant is not aware of, and the Court issues a warrant for her arrest. The Appellant files Motion to

Quash, but the 11th Judicial District Court does not hear, thus it is deemed denied.

4. **Statement of issues.** The issues raised by this appeal are:

I. **First Issue - Double Jeopardy** – N.M.S.A. 31-1-10 No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. Court of Appeals files Memorandum Opinion (RP 309) on November 20, 2000, which dismisses the misdemeanor conviction (Collateral Estoppels). On November 13,2001 a hearing was held and Appellant advised the 11th Judicial District Court of The New Mexico Court of Appeals Memorandum Opinion:

(November 13, 2001 Page 4, Line 6)

> Judge William Birdsall - "…. I have a copy of that. The State will need to do an amended Judgment & Sentence that reflects the- I think they in effective dismissed it. I'm not sure."
> Assistant District Attorney Sandra A Price - "Yes, we did your Honor."
> Judge William Birdsall -" Let's go ahead and do an amended Judgment & Sentence that would reflect that so we'll have a clean slate on that."

The Court and San Juan County District Attorney states on the record in a legal proceeding on November 13, 2001 that the Conviction was dismissed, however as of November 13, 2001

there was no Order nor an Amended Judgment & Sentence completed to dismiss. The 11th Judicial District Court signs order of probation on November 15, 2001. (RP 405) adding the six months sentence which was dismissed. 11th Judicial District Court acknowledges in the November 13, 2001 hearing that it would be a mathematical deduction. The Amended Judgment & Sentence was filed December 4, 2001. In the hearing of February 8, 2002 the 11th Judicial District Court was advised of the six months still being on the record. As of March 24, 2003, the Order of Probation still places Appellant in double jeopardy.

(February 8, 2002 Page 9, Line 3)

> The Court: So then the argument is that we had six-year—a six year sentence, less a year and a half of incarceration, would leave four and half years of supervised probation.
> Mr. Whitehead: You imposed five, I believe.
> The Court: Well, there may have been some—who knows.

(July 10, 2002 Page 5, line 13)

> The Court: "well, what residual rights does the defendant have in that regard, considering the fact the she is a probationer and, I think, parolee after having been convicted of a felony or felonies and released under supervision?"

The Judiciary Code of Conduct requires the Court's to know their case load as well, as well as the rights of the Appellant.

In case 98-899-6 Appellant was indicted by the Grand Jury on October 23, 1998 on seven counts including fraud, or in the alternative embezzlement, charges of forgery, perjury, insurance code felonies and misdemeanors. (RP 114). The case was dismissed for 5-604, NMRA 1999 on June 23, 1999 (RP 114). The District Attorney brings a second grand jury indictment on November 6, 1998 (RP 1-RP 3) for additional charges from the same continuing act, as well as adding 6 misdemeanor charges on June 25, 1999 (RP 94-RP 95). 11th Judicial District Court is informed (RP 103-RP 104) that it is double jeopardy and a violation of U.S. Constitution, Article V, and State of New Mexico Constitution, Article II, Section 15 (RP 103 -#1). Appellant's Counsel submitted there could be only one prosecution for a continuing crime. (RP 104 -#4) The charges were brought by a Grand Jury Indictment for case CR 98-899-6 and a second grand jury for Case 98-935-1. The charges were dismissed as a result 5-604, not by the State. The charges filed are the same for the continuing crime. (RP 104-#3) The testimony shows the same continuing act by Appellant.

(August 24, 1999 Page 80, Line 2)

Sandra Price: Was she your insurance agent from 1991 to 1998?
Toni Wilkins: Yes

Ex Parte Nielsen, 131 U.S. 176

> "It will be observed that all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal."

The Conviction should be reversed due to Doubled Jeopardy and the harm it has placed upon Appellant.

II. **Second Issue- Illegal Search & Seizures, Motions & Orders**

.The Appellant and Richard Smith have an expectation of privacy in their bank records and telephone records, under the United States Constitution and New Mexico Constitution. The rights given an individual by a statute may be an enlargement of the constitutional guarantees a right afforded an individual by the legislature is nonetheless a right whether it is an enlargement of a constitutional or a legislative right. Statutes may enlarge constitutional rights but they may not impinge upon, conflict with, or reduce constitutional protections. All evidence is general admissible, unless obtained unlawfully or illegally against due

process and the exclusionary rule would apply. There is a process by which telephone and bank records can be obtained. Due Process requires notification of all parties prior to obtaining said records. Service a subpoena must be on all parties. The Appellant has the same rights and expectations that other parties do with respects to an illegal search and seizure the exclusionary rule **does** apply in probation hearings. The San Juan County District Attorney has previously unlawfully obtained Appellant's records from the same bank (Wells Fargo) for use in a probation revocation hearing as well as other bank records (Sun West Bank) and telephone records (U. S. West, a/k/a Qwest) (RP 443-RP 444) prior to trial. Appellant is not informed of Subpoena to Sun West or U S West till after she has been sent to prison. (RP 378 to RP 384). Due Process mandates that all parties are notified upon service of a subpoena. A fraud perpetrated upon the Person/Company being served. Fraud is an element in the RICO ACT (RICO) Act, 18 U.S.C. §§ 1961-68 (1994), NMSA 30-42-1 to 30-42-6 , Racketeering

NMSA 30-42-3 (D)

> "pattern of racketeering activity" means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited

> activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of the incidents occurred after the effective date of the Racketeering Act and the last incident occurred within five years after the commission of a prior incident of racketeering"

STATE v. EDER, 103 N.M. 211 *(App. 1985)* 704 P.2d 465

> "The same reasoning applies to compelling witnesses to produce documents with unauthorized subpoenas. The practice has been deemed coercive and intimidating. To the extent that an unknowing witness may feel compelled to attend or produce documents, the practice amounts to perpetrating a deceit on the witness. NMSA 1978, Code of Prof.Resp. Rule 1-102(A) (4) (Repl. Pamp. 1982) defines misconduct as including engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."

Said records from Wells Fargo should be excluded as fruits of the previous illegal search and seizure of Appellant's bank records on October 30, 2001 (RP 382). The Subpoena was that the State served to Wells Fargo Bank was not served Appellant or her husband a Motion was filed to Quash Subpoena Duces Tecum

May 3, 02, Page 4, line 16

> Mr. Whitehead: Court's attention, since Ms. Price gave me a stack of bank records that she, apparently, plans to introduce under the motion to quash, and I have a subpoena for those records because they were obtained in violation of New Mexico statue."

May 3, 02, Page 5, line 4

Mr. Whitehead: Yes. The only records I've been provided have been from Wells Fargo.

On July 10, 02 a hearing is held in regards to obtaining the same Wells Fargo Bank records which were previously obtained by The State as a result of an illegal search and seizure. A second Subpoena is served upon the Appellant and her husband for the Wells Fargo Bank records. The second Motion to quash if filed for Appellant by Mr. Whitehead and Mr. Smith files his Pro Se. The Bank is served the Subpoena the bank notifies the Appellant, and Mr. Smith, a copy of the Motion to Quash Subpoena Duces Tecum is sent to Wells Fargo Bank. The Honorable Wm. C Birdsall signs an Order allowing the Subpoena, Counsel and Mr. Smith was not notified prior to Order being signed. (RP 463) (See Sixth Issue)

> STATE V. MARQUART, 123 N.M. 809 *(App. 1997)* 945 P.2d 1027
>
> The Defendant has the same rights and expectations that other parties do with respects to an illegal search and seizure the exclusionary rule does apply in probation hearings.

It is not a question of reissuing a subpoena to comply with State Statue; it is a matter of an illegal search and seizure of which the

fruits must not be allowed. It is none the less a right that the Appellant and her husband, guaranteed by due process, under the United States Constitution and that of the Constitution for the State of New Mexico.

> NMRA LR11-103 (C) Submission of orders, judgments, briefs, and findings
>
> C. "Orders, decrees, and judgments shall not be submitted to the court for signature unless they have been initialed by all attorneys of record or unless the attorney submitting same certifies to the court that opposing counsel has, after five (5) days of receiving the order, decree, or judgment, failed or refused to initial same."
>
> MONTANO v. ENCINIAS, 103 N.M. 515 (1985) 709 P.2d 1024
>
> "In any event, we direct that judgments or orders in New Mexico shall not be entered in the court record in anonymity. If such a document does not indicate by counsel's signatures that all parties affected have seen it before it is presented for the judge's signature, the judge shall be satisfied by proof of service that notice of presentation has been given to attorneys for all parties."

The ORDER ALLOWING THE ISSUANCE OF SUBPOENA DUCE TECUM (RP 463) of the 11th Judicial District Court should be dismissed for due process.

III. **Third Issue- Due Process & timely hearing violated by Motion for Revocation of Probation filed without referral from**

NM Adult Parole & Probation or AZ Adult Parole & Probation . Order of Probation is signed on November 13, 2001. Motion for Revocation is filed by San Juan County District Attorney on Sept 28, 2001. Any Parole or Probation Revocation must have an Independent Finding of Facts.

GAGNON v. SCARPELLI, 411 U.S. 778 (1973)

> " Due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in Morrissey v. Brewer, 408 U.S. 471, in the case of a parolee."

MORRISSEY v. BREWER, 408 U.S. 471 (1972)

> "At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole."

There has been no fact finding, evidence was not presented to Appellant, and 16 months with 10 hearings is not timely. Appellant filed Motion to Compel District Attorney & San Juan County Parole & Probation Office to Release Information in Appellant's

File In Above Entitled Case. (RP352) Motion to Compel Disclosure (RP 374). Appellant has never seen anything from District Attorney or State of New Mexico. Appellant has not received disclosure, nor has Counsel.

May 3, 02, Page 5, line 4

Mr. Whitehead: Yes. The only records I've been provided have been from Wells Fargo.

IV. Fourth Issue- State of New Mexico must comply with Interstate Compact Adult Parole & Probation Requirements. 4 U.S.C. § 112 allows Interstate Compacts, and State of New Mexico (N.M.S.A. 31-5-20) and State of Arizona (A.R.S.31-467) are parties to the Federal Interstate Compact and the U.S.C. A. 14th Amendment (Due Process).

CAMERON v. MILLS, (S.D.Iowa 1986) ***645 F. Supp. 1119***

> Within this area, apparently, a compact that does not receive congressional consent will not be invalidated for lack of consent, but a compact that is consented to by Congress will thereby become federal law....Thus, the final stage in this analysis is whether Congress has already consented to the compact between Iowa and Kansas. This Court believes that it has. In 4 U.S.C. § 112(a), Congress provided:
>
> > The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the

prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements in compacts.

Examination of this statute's legislation history demonstrates that Congress also intended this statute as approval for interstate corrections compacts

Jurisdiction is therefore Federal Court not State District Court.

Interstate Compact Cooperative Report February 08, 2001 was sent to New Mexico Adult Parole & Probation/New Mexico Interstate Compact/ Department of Corrections. New Mexico Interstate Compact (RP 400). Acknowledges that Arizona has set terms and conditions under the Interstate Compact. Investigative report was admitted into evidence in hearing on November 20, 2002. Arizona Interstate Compact sets terms of supervision:

Third Paragraph Arizona states:

" On Page 2 of New Mexico's Investigation Request, there is a request involving the offender's criminal record and copies of this to be signed by prospective employers..."Arizona does not require employers to see an offenders record..."
"Would New Mexico please send this officer the information offender Smith needs on where and when to start her court ordered payments."?

The Interstate Compact allows the Conditions of Parole & Probation to be addressed by the receiving state; the sending state shall conform to these changes

Section 2-110 (A) in part:

> "Any Receiving State which choose not to enforce or is not able to enforce a special condition placed upon a parolee or probationer by the sending state shall notify the sending state, as soon as is possible, that the special condition will not be enforced."

Section III- Eligibility for Supervision (C):

> "Offenders will comply with the conditions of supervision imposed by both sending and receiving states. The receiving state may impose its own special conditions and shall notify the sending state of such condition as soon as possible. If the receiving state chooses not to, or is unable to enforce a condition of supervision imposed by the sending state, the receiving state shall notify the sending state immediately."

Arizona Interstate Compact Adult Parole & Probation did, as required by Law, New Mexico Interstate Compact Deputy Administrator verifies that this was done, and that New Mexico could not violate my Probation or Parole.

New Mexico Interstate Compact Deputy Administrator Celeste Casias States:

> "Assistant District Attorney in Farmington had filed a petition to revoke your probation Ms.

> Standerwick stated she had nothing to do with the petition and that the ADA had initiated this action".... "You asked me to contact Ms. Sandra Price, ADA in San Juan County; I did so at your request. I informed Ms. Price as to what occurred with your probation and miscommunication between the Probation Office, the Parole Office and Interstate Compact. Ms Price informed me that she was not seeking revocation of your probation that she wanted clarification and a promissory note signed as to your restitution."

New Mexico wants a promissory note signed for restitution; however, this was not presented to Appellant until after November 1, 2001. When the promissory note was presented, Appellant was told she had to sign, she could not refuse.

Arizona spoke to State of New Mexico District Attorney and Farmington Adult Parole & Probation Office indicating we needed clarification on where to send restitution. Copy of Memo from Arlin Chester to Linda Standerwick. Under Interstate Compact (Federal Regulation) the receiving states has jurisdiction of the supervision, not the sending state. Terms & Conditions were added to Order of Probation in violation of Federal Law of Interstate Compact for Adult Offender Supervision. The condition of informing my employer of said conviction would not be allowed by Arlin Chester, AZ Department of Parole & Probation.

November 20, 2002 Transcript Page 61 Line 10- Page 63 Line 5.

Mr. Whitehead:
Judge, the reason I asked those questions were because her probation and parole were transferred to the State of Arizona and her parole officer modified that condition of her supervision, as he is allowed to do so under the interstate compacts, and he notified the State of New Mexico Interstate Compact Office that he was modifying that condition.

And the fact is that she is to disclose to any prospective employers the nature of conviction and parole status when the employment involves any handling of any monetary funds.

Ms Price:
Your Honor, again, that doesn't change what this Court ordered Ms. Smith to do and—as a term. And the State has—if you look at our third amended motion to revoke probation and judgment of the sentence, she has violated what this Court told her to do, and I don't believe any parole officer can change what this Court ordered Ms. Smith to do.

And you asked, actually, as part of the judgment sentence order, that she notify any employer, not just this dealing in money, but any employer of her conviction in writing. Any, Your Honor, I don't believe that Ms. Smith—her parole officer can change what this Court has ordered her to do.

The Court:
Well, I don't know whether the parole officer can or can't, but then what's the Appellant to do?

Mr. Whitehead:
Section 2-110 of the Interstate Compact specifies the receiving state may choose not to enforce any special condition placed upon the parolee or probationer and

shall notify the sending state as soon as possible whether or not they're going to enforce the schedule, which they did—

Ms. Price:
Your Honor, we are not trying to revoke her parole. We've been through this previously. It is an order of her - - her probation that she – well, and also Judge, you ordered her. You stood—she stood in front of this Court and you ordered her to notify any employer. And if we need to pull the tape, it's definitely part of the judgment and sentence. You ordered her to notify her employer, not just those dealing in money, but any employer of her felony conviction, in writing.

Judge, we're not filing a motion to revoke her parole. She was on notice by this Court and her probation officer that she must notify any employer of her felony conviction.

Mr. Whitehead:
Judge, her probation was also transferred to Arizona with the Interstate Compact, and her probation conditions are the same as parole conditions.

The District Attorney does not acknowledge the Constitutional rights of Appellant and even states that no one could change what the 11th Judicial District Court ordered. (See Eleventh Issue) The 11th Judicial District Court was informed that this Federal Law. (See Eighth Issue)

V. **Fifth Issue- Appoint of Counsel by Court**. Appellant filed motion for appointment of counsel. (RP 361-RP 371) When a

Liberty Interest is in jeopardy, Appellant should have counsel appointed.

November 13, 2001 Page 3, Line 6

> "They can do anything at all that they want to do, and some of these motions are not going to go anywhere, ma'am, but we need to get you an attorney in order for you to have adequate representation."

November 13, 2001 Page 6, Line 20

> Ms. Smith: "And if they declare I that I'm not eligible where do we go from there, Your Honor?"
> The Court: "You'll have to hire yourself and attorney or you'll be pro se, representing yourself.
> Ms. Smith: "Okay. You will allow me to go pro se, Your Honor?"
> The Court: "Reluctantly I'll have no choice, Ma'am."
> Ms. Smith: "Can you Order me an attorney at that point if they determine I'm not?"
> The Court: "No. I can't order you an attorney. If you are not financially qualified to have a Public Defender appointed, then you will either hire an attorney with your own money or you will be here on your own. Okay?"

The Court refuses to appoint counsel thus leaving Appellant to borrow money to obtain counsel. Financial capabilities of Appellant were not even considered by the Court. Under the United States Constitution and New Mexico State Constitution it guarantees Counsel is to be appointed if you cannot afford one.

STATE EX REL. QUINTANA v. SCHNEDAR, 115 N.M. 573 (1993), *855 P.2d 562,*

> The inherent power of the judiciary to appoint counsel for indigent defendants is within the unique province of the courts to ensure the constitutionality of criminal prosecutions

VI. Sixth Issue -Right to be Heard & Notification of Hearings

November 13, 2001 Page 3, Line 6

> "They can do anything at all that they want to do, and some of these motions are not going to go anywhere, ma'am, but we need to get you an attorney in order for you to have adequate representation."

When Appellant's Husband wanted to be heard in the hearing of November 20, 2002, Richard Smith requests to be heard and the Court States:

November 20, 2002, Page 6, Line 22 & 23

Mr. Smith: May I Speak, Your Honor?
The Court: I'll chat with you, Mr. Smith when I need to. Thank You.

The 11th Judicial District Court does not hear or rule on motions filed by Appellant. Motions from October 2001 (RP 332) to March 24, 2003 (RP5??) have not been heard, with the exception of the Motion to Revoke (filed by District Attorney) and Motion to Quash Subpoena Duces Tecum, which the 11th Judicial Court denied. Due Process mandates notification of hearings, Appellant

has never been notified by the Court of the hearings (RP 354, RP 410, RP421, RP 425, RP 427, RP 461, RP 464, RP469, and RP481). Appellant's name has a line drawn through it. Motions that Appellant has filed have never been heard or ruled on. The Record Proper will show that any motions or orders filed were not sent to Appellant, (RP 331, RP 356, RP358, RP 414, RP 416, RP418, RP 463) Due Process requires notification of such hearing, a fundamental error occurs when it is not.

NMRA LR 11-101 (B) Setting of the trial and hearings

> B. "All settings made by the court shall be binding upon **all parties** and attorneys properly noticed. No setting shall be vacated except upon good cause shown by written motion."

Appellant is a party and therefore should have been notified. Appellant was not notified by the 11th Judicial District Court, of a hearing on January 14, 2003 and as result of the negligence of the11th Judicial District Court, a Warrant for her arrest was issued. A motion to dismiss was filed on January 22, 2003 the 11th Judicial District Court does not hear the motion just as it has a history of. Thus it is deemed denied.

> STATE v. VEGA, 91 N.M. 22 (1977) 569 P.2d 948 as referred to:

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84
A.L.R. 527 (1932) states:

"It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

The warrant should therefore me dismissed.

XII. **Seventh Issue- Perjured Testimony & Right to Confrontation.** Transcript verifies Appellant was not afforded the testimony of Gilbert Lopez, State of New Mexico, Investigator. He was listed on Witness List, (RP 87) However, in Judge's Chamber he was not allowed to testify. If Lopez had testified his report would have been brought up and the District Attorney knew she withheld it.

August 26, 2001 Page 81 Line 11

The Court: The Defense has indicated a desire to call a Mr. Lopez; is that correct?
Mr. O'Reilly: that is correct, your Honor.
The Court As I understand it, he is a representative of the Workers Compensation Administration, and it would be – what his testimony would be, would be to the effect that the arrangement whereby Bubble City, Inc. became Bubbles, Inc., and thereby reduced its workers' compensation modifier would have been considered fraudulent, a fraudulent practice under New Mexico

> Workers' Compensation Administration rules, regulations and statues. Am I correct in that?
> Mr. O'Reilly: Yes.
>
> The Court: And he's right, it would be. However, we've had testimony both ways as to the involvement of both parties. On the one hand, I've determined not to allow that testimony, because it speaks of a specific instance, it we're tacking about impeachment of the Wilkinses, rather than a general reputation for honesty 0r veracity or whatever. And then on the other hand, if it went against the defendant, which it might, it would also be improper and prejudicial. Did you want to make a record on that, Mr. O'Reilly?

Mr. Lopez testified at the Grand Jury, he should have testified at the trial, especially since he was listed as a witness for defense and prosecution.

Appellant has a right to confront the witnesses against them. Perjured Testimony should be rebutted. In the August 99 Trial Joe Wilkins committed perjury and testifies to calling a witness (Ed Burton) for the defense and telling him to change his story. Joe Wilkins was asked if a Lien had ever been filed against Cheri Smith or Red Apple Valley in his behalf. He indicated no. A hearing was held in the Judges Chambers and it was ruled that the Appellant could not have defense witness Joyce Johnson from San Juan Hospital was ready to testify that Joe Wilkins had not told the

truth about a Hospital Bill Lien filed against Cheri Smith or Red Apple Valley Insurance.

August 26, 1999 Conference in Chambers Page 84, Line 1

> The Court: Okay. We'll go on the record in State of New Mexico versus Cheri Smith, CR-98-935-1. We've been—we're in chambers. Appellant is present with Counsel; State is present by counsel. We've discussed an issue that the defense has raised about proffering testimony from a representative of the accounting or bookkeeping department of San Juan Regional Medical Center to the effect that testimony would be presented by a Joyce Johnson that Joe Wilkins, one of the witnesses who has testified previously and who is semi-alleged victim, or an alleged semi-victim—I don't know, he's sort of an alleged victim in this case—had earlier testified that he knew nothing of a hospital lien that was placed against Red Apple Valley Insurance by San Juan Regional Medical Center involving medical bills owed by Mr. Wilkins…As I understand it, the testimony from Ms. Johnson would be that Mr. Wilkins did, in fact, have some knowledge of the issue, because she'd communicated with him concerning that. There may also, but we're not concerned at this point, might be testimony, or might not, from Ms. Johnson as to whether she has personal knowledge to the fact that the Appellant, Ms. Smith, then, in effect straightened the matter out…. Am I relating that accurately, Mr. O'Reilly?"
>
> Mr. O'Reilly: That is correct your Honor.

August 26, 1999 Conference in Chambers Page 85, Line 11

> The Court… I'm not going to allow the testimony, but not on that reason. I think that it is too peripheral to the issues. I understand the defense's position it would

> tend to contradict Mr. Wilkins testimony in one finite instance, as far as the service rendered indicated on the accounting, which is an exhibit in the—the account provided by Ms. Smith for services rendered to the Wilkins and Bubbles, Inc. But I—I don't want to open that door at this point. I also don't think it's sufficiently relevant to have an impact one way or the other on the jury."

It is not a question of what the Court thinks, bur what the jury hears and decides

U.S. v. CABALLERO, *277 F.3d 1235* (10th Cir. 2002)

> In order to establish a due process violation, the Caballeros must show that (1) Avila's testimony was in fact false, (2) the prosecution knew it to be false, and (3) the testimony was material.

The Court and District Attorney both knew the testimony was in fact false, and that the testimony was material since it pertained to evidence admitted into the record.

VIII. **Eight Issue- Right of Appeal** -Judge Losses Authority to hear when appeal is filed. Whenever an appeal is filed to a superior court, the lower court looses jurisdiction to hear any thing except for the purpose of perfecting the appeal to this court and for the purpose of passing upon motions pending when the appeal is taken. The Court was duly notified of appeal of 11/16/02 for Richard Smith, and that it did not have jurisdiction to hear. A hearing was held on 11/20/02, and the issues appealed were heard

in the Court. Appellant's husband (Richard Smith) filed an appeal (23,600) on November 19, 2002, which he is entitled to due process. A hearing was held on November 20, 02 in the 11th Judicial District Court. Witnesses that testified were obtained from illegal subpoena, (RP 420- #2) the basis of said appeal. The Appellant filed Notice of appeal and Docketing Statement (RP 509) (23,725) on January 13, 2002. The 11th Judicial District Court has a hearing on January 14, 2002, which Appellant was not notified of, and asserted her rights to due process and the 11th Judicial District Court violated appellant's rights and issues a warrant for her arrest.

> STATE v. CLEMONS, *83, N.M. 674 (App. 1972)* 496 P.2d 167
>
> > "* * * the taking of an appeal from a judgment in a civil case completely divests the district court of jurisdiction except for the purpose of perfecting the appeal to this court and for the purpose of passing upon motions pending when the appeal is taken, or for the timely vacating of an order granting appeal.

Therefore the 11th Judicial District Court lost authority until a Memorandum Opinion was issued by the New Mexico Court of Appeals. The warrant should be dismissed.

IX. **Ninth Issue- Speedy Trial.** Actions prior to trial along with current acts have placed Appellant in irreparable harm; extraordinary hardship, costly delays, or unusual burdens of expense have resulted. Appellant asserted her rights to a Speedy Trial, (RP 75). State District Attorney filed for extension to try. Upon the review the Court will note that The Supreme Court granted an extension of time to try Appellant based upon the Petition filed by Sandra A Price, Assistant District Attorney. Price committed Deceit upon the Supreme Court when she informed the Court of the Facts why the extension was needed.

In the Supreme Court of the State of New Mexico

PETITION FOR EXTENSION OF TIME IN WHICH TO TRY DEFENDANT:

> (5) "This matter was set for trial and continued because the defense has been unable to interview an expert witness listed by the State. The Defendant had plans for vacation out of the Country and a trial setting in another Court. The earliest trial setting available is August 24, thru August 27, 1999, outside the extension granted through August 16, 1999.

July 1, 99 Court Transcript Pages 1-57 Verify that Charges were added to the Case from a Grand Jury Indictment which was dismissed in Case 98-899-6. The Transcript also verifies that

Appellants Attorney would be out of the Country **after** times ran, and had a Court setting **after** time ran. (Page 37 Line 12- Page 40 Line 25) The transcript also verifies that the reason that the Appellant's Attorney could not interview the witness for the State since the State did not give the Appellant and her Attorney the Evidence. (Page 27; Line 10-Page 36 Line 25) In Fact when the Attorney went by to see the evidence the State informed him he could not see the evidence (Page 32 Line 12-Page 33 Line 8).

> STATE v. MANZANARES, *121 N.M. 798* (1996) *918 P.2d 714*
>
> "The Sixth Amendment mandates that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. ..... In determining whether the right to speedy trial has been violated, a reviewing court must apply the four-factor balancing test from *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-92, 33 L.Ed.2d 101 (1972). The four factors of this test are the "(1) length of delay, (2) reasons for the delay, (3) assertion of the right, and (4) prejudice to the defendant." *Salandre,* 111 N.M. at 425, 806 P.2d at 565.

The delay was brought about the District Attorney and the failure to disclose evidence, even after the extension was granted the evidenced was withheld. The Right to a Speedy Trial was asserted by Appellant, The Appellant was prejudiced by the extension to

try. Nine months marks the minimum length of time that may be considered presumptively prejudicial, even for a case such as this involving simple charges and readily-available evidence.

X. **Tenth Issue- Evidence Withheld/ Disclosure by District Attorney, Rules of Criminal Procedure** –July 1, 99 Court Transcript Pages 1-57 Verify that Charges were added to the Case from a Grand Jury Indictment which was dismissed in Case 98-899-6. The Transcript also verifies that Appellants Attorney would be out of the Country **after** times ran, and had a Court setting **after** time ran. (Page 37 Line 12- Page 40 Line 25) The transcript also verifies that the reason that the Appellant's Attorney could not interview the witness for the State since the State did not give the Appellant and her Attorney the Evidence. (Page 27; Line 10-Page 36 Line 25) In Fact when the Attorney went by to see the evidence the State informed him he could not see the evidence (Page 32 Line 12-Page 33 Line 8). After Appellant is convicted, she finds out that Gilbert Lopez, who testified at the Grand Jury, but not allowed at trial; gave a report to State District Attorney and was the basis of his testimony at the Grand Jury. Appellant wrote to Insurance Fraud Division to obtain report and they could not locate, however, Mr. Lopez informed counsel it did exist. Counsel

filed motion for disclosure (RP 12) December 1998, and Bill of Particulars (RP 16). State does not comply with rules of discovery NMRA 5-501 July 99 Defense Counsel prior to trial and during Probation revocation both states on record they have not seen evidence. District Attorney has an obligation to disclose. Evidence is still not disclosed after extension to try is granted by Supreme Court.

NMRA 5-501:

A. Information subject to disclosure.

Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment, subject to Paragraph E of this rule, the state shall disclose or make available to the Appellant:

D. Certificate of compliance.

The prosecutor shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgement of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the prosecutor to the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the defendant.

The record will reflect that this was not done by the District Attorney, violating due process. When the Court was advised of the evidence not being released and the actions of the District Attorney, the 11th Judicial Court did nothing.

BRADY *v.* MARYLAND, *373 U.S. 83* (1963)

> Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

UNITED STATES v. AGURS, 427 U.S. 97 (1976)

> a prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the Appellant's right to a fair trial.

XI. **Eleventh Issue- Deceit/Perjury of District Attorney (Prosecutorial Misconduct)** before, during trial and in post conviction proceedings. In the hearing of November 13, 01, Judge William Birdsall is informed of the perjury as well as illegal search and seizure of bank records by District Attorney, now Chief Deputy Assistant District Attorney Sandra A Price

November 13, 2001 Page 5, Line 15-25

Ms. Smith: "there has been a subpoena served illegally. It's an illegal search and seizure. I have made a motion. I would like a ruling that those documents be turned back to us and that they not be allowed. The District Attorney did this will intent and we were never notified.
The Court: " what are you talking about, ma'am?"
Ms. Smith: " The Assistant District Attorney, if you look in my paperwork that was filed this morning, if you Honor has it. If not I do have a copy. It's a motion to Quash Subpoena Duces Tecum, and forgive me if I say it incorrectly because I'm not an attorney.

Page 6, Line 1-4

The Court:- " that's why I want to get you one, so that the attorney can help you make sense of this, ma'am"
Ms Smith: "Yes, Your Honor."

Page 7, Line 21-25

Ms. Smith: " I'm sorry to interrupt, but there is one thing, and I do need this on the record. Any communication that is to be given shall be given in the form prescribed by rules of law. The District Attorney has not applied or given me any documents except one, and it

Page 8, Line 1-

Was faxed to me, which indicates they do have my fax number. I think we need to play on a level ground likes the law says we're supposed to."
The Court: "That's right. You both need to serve each other with anything that you file with the Court."
Ms. Smith: "And the Chief District Attorney has not done that thus far."

Ms. Price: "Your Honor, I did not have her address until I got the letter from –"
The Court: " Okay, Okay, Okay"
Ms. Smith: " Your Honor-"
The Court: "we know that we're got the address now"
Ms. Price: "I have the fax number. Right."
Ms. Smith: "Your Honor, I beg to differ. She received a fax prior to my motion. She has had it from day one. She has just lied to the Court and I want it in the court record. This is not going in the way it is supposed to. She had the fax number and address since she filed the revocation. She got the it from my parole officer; Your Honor She just lied to you."
The Court: Okay, Well, we'll deal with that at some other date. Maybe on the 26th when we see if you've got a lawyer

The perjury is brought to the attention of the Court; The Honorable William C Birdsall does nothing. The issue is not referred. Judge William C Birdsall does not uphold the Judiciary Code of Conduct.

21-300. A judge shall perform the duties of office impartially and diligently

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

The District Attorney, Sandra A Price, says she did not have the address to serve a subpoena she issued. On October 30, 2001. When in fact she had the address on September 28, 2001 to issue a summons to appear (RP 330) The same District Attorney withholds evidence prior to trial, as well as her State investigative report (Gilbert Lopez); files a Second Grand Jury Indictment as well as 6 misdemeanor charges from the same continuing act, placing Appellant in double jeopardy; commits deceit upon the New Mexico Supreme Court when asking for an extension to try; Initiated a probation revocation without due process; Interfering in parole and probation supervision; Not assisting the Arizona Parole & Probation's Office/ Interstate Compact with an order of probation, instead filling for a revocation; Contacting Appellants employers telling them of conviction- action to get Petitioner in a position wherein she could not pay restitution- result would be revocation of probation.; and Filed Revocation of Probation without referral from the Court, NM Adult Parole & Probation, or AZ Adult Parole & Probation, violating Federal Interstate Compact Law 4 U.S.C. § 112 which allows Interstate Compacts, and State of New Mexico (N.M.S.A. 31-5-20) and State of Arizona (A.R.S.31-467). Federal Law mandates that the District Attorney

comply with Arizona's requests. Instead of doing as Arizona requests, District Attorney files motion to revoke probation. Then violates Federal Interstate Compact law trying to enforce conditions, which Arizona addressed and parole said would not be enforced. District Attorney has filed three MOTIONS TO REVOKE over 16-month period, requiring appellate to return 10 times for hearings. The motions are not based upon any requirements such as an independent party, timely hearing, and a written report of fact presented to applicant, pursuant to law. The same District Attorney states that no one can override the 11th Judicial District Court. The same District Attorney that stated the Misdemeanor conviction had been dismissed; however there was no Order or Amended Judgment & Sentence filed in the 11th Judicial District Court. The same District Attorney that issued numerous Subpoena's to various parties including but not limited to Employers, Landlords, Banks, & Telephone without due process and service on all parties, (deceit and fraud) RICO ACT30-42-1 to 30-42-6 § Racketeering Act (Rico), before during, and after trial. One would wonder if this isn't prosecutorial misconduct or maybe vindictiveness, after all this District Attorney has more than 12 years experience, and was at one time the District

Attorney, an elected official from 1996-2000. The same District Attorney that allowed States Witness to call Defense Witness and tell him to change his story, The same District Attorney who did not issue a target notice prior to the Grand Jury of November 6, 1998, which the record will reflect, Excessive Bail $50,000 bail for embezzlement / fraud of $7,900.00. Property owned & adequate assets were present. (RP 101) The same District Attorney evaded its discovery obligation and in engaged in a pattern of evasion, deceit, perjury and willful persecution. The United States Constitution and the New Mexico State Constitution mandates that the action pending be dismissed, and that charges be referred against the District Attorney, for violating the Attorney's Code of Conduct as well as Appellant's Civil Rights.

XII. **Twelfth Issue- Abuse of Discretion** -An abuse of discretion occurs when a judicial determination is arbitrary, capricious or whimsical. It is not merely an error of law or judgment, but an overriding of the law by the exercise of manifestly unreasonable judgment or the result of impartiality, prejudice, bias or ill-will as shown by evidence or the record of proceedings. The Honorable William C Birdsall shows this when

he is informed of the Perjury of the Chief Deputy Assistant District Attorney, when he is apprised that Arizona could change Parole/Probation conditions that this is Federal Law, that Due Process is required for a Probation Revocation, of the illegal search and seizure by Chief Deputy Assistant District Attorney, and not hearing any motions filed by appellant. The 11TH Judicial District Court then has hearing for January 14, 2003 which the appellant is not notified of, although she has been at 10 hearings over the course of 16 months, and paid her restitution that is in the order of probation, and when Appellant is not notified issues a warrant for her arrest, but has never heard any motions filed by Appellant. The Appellant filed a Motion for Dismissal (RP 385) on November 13, 2001. The Honorable William C Birdsall denies the Motion to Dismiss (RP 426) on March 6, 2002, but Appellant is not notified. The Order does not comply with due process (NMRA LR11-103 (C)).

XIII. **Thirteenth Issue- Order of Probation/Promissory Note- Due Process for Ability to Pay, Signing Promissory Note, Telling Employer of Conviction.** Order of Probation received by Defendant is incorrect, however Defendant was informed to sign them, and they would be corrected. Restitution was not determined

as to what the Defendant could afford to pay, and of course the Promissory Note is turning a criminal conviction into a civil Judgment. The Judgment and Sentence does not say as a condition of probation with specificity of telling and employer of said conviction nor does it say as a condition of probation that the promissory note must be signed, or as a condition of the suspended sentence. (RP 41) Appellant's current employment was did not involve insurance which is the type of work in which the conviction occurred. Order of Probation also places Defendant in Double Jeopardy (Collateral Estoppels) which the Court of Appeals issued Opinion Memorandum. (RP 309)

STATE v. MARTINEZ, 84 N.M 295 (App. 1972) 502 P.2d 320.

> "If the deferred sentence does not set out the conditions of probation, there are no conditions to be violated". State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968)

U.S. v. DIAMOND, 969 F.2d 961 (10th Cir. 1992):

> "Although a restitution order is characteristically similar to a civil judgment in that it compensates a victim for losses and remains enforceable at civil law, the court cannot convert a criminal sentence into a civil judgment. United States v. Snider, 957 F.2d 703, 707 (9th Cir. 1992) (quoting United States v. Ciambrone, 602 F. Supp. 563, 568 (S.D.N.Y. 1984)). Where a court orders restitution under the VWPA, it "may not require the defendant to execute a consent judgment or otherwise require him to

secure payment `during and after the period of probation.'" United States v. Joseph, 914 F.2d 780, 786 (6th Cir. 1990). Although a court may require a defendant to make restitution under the VWPA "within a specified period or in specified installments," 18 U.S.C. § 3663(f) (1) (1988), the duration of such period or the last such installment "shall not be later than- (A) the end of the period of probation, if probation is ordered." Id. at § 3663(f) (2) (A)."

DOE V FAUVER, 3F.SUPP.2D 485 (D.N.J 1997)

Parolee was entitled to preliminary injunction to prevent State Parole Board from informing his employer of his status as a parolee and the nature of his crime, given the likelihood of success on the merits on parolee's claim that employer notification infringed upon his liberty interests in violation of the due process clause of the fourteenth Amendment.

The Order of Probation should be dismissed, due to the erroneous nature of the document as well as violating due process and Constitutional Rights of the Appellant.

5. List of Authorities

1) **First Issue–Double Jeopardy** U.S. Constitution, Article V & XIV, and State of New Mexico Constitution, Article II, §15, N.M.S.A. 31-1-10 Double Jeopardy , No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment.

STATE v. APODACA, 123 N.M. 372 (App. 1997) *940 P.2d 478* Article VI, Section 2 speaks of the right to *one* appeal, more than one appeal may be necessary in a single case to serve the purpose of the constitutional provision

STATE V. TIJERINA, 86 N.M. 31, 519 P.2D 127, 129, 130 (1973) It should not be inferred from this opinion that this Court intends to encourage or approve piecemeal prosecution. Such disorderly criminal procedures involve a myriad of problems which threaten the existence of our judicial system. The risk of prejudice to the accused, and the waste of time inherent in multiple trials, both perpetuate delays in the judicial process and unconscionable expenditures of public funds, all of which could be avoided by prosecutors getting their facts straight, their theories clearly in mind and trying all charges together.

EX PARTE NIELSEN, 131 U.S. 176 it will be observed that all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal.

STATE v. QUINTANA, *69 N.M. 51* (1961)*364 P.2d 120* However, if the several offenses are the same, as where they arise out of the same transaction, and were committed at the same time, and were part of a continuous criminal act, and inspired by the same criminal intent, which is an essential element of each offense, they are susceptible of only one punishment.

2) **Second Issue – Illegal Search & Seizures, Motions & Orders** United States Constitution Amendment IV. Illegal Search & Seizures N.M. Constitution Article II, §10, NMSA 1978 §14-7-1, (A) Requiring notice of intent to gain access to records of financial institutions, §§ 30-42-1 to 30-42-6 § Racketeering Act (Rico) and NMRA §5-103 Service and filing of pleadings and other papers, 18 U.S.C. §§ 1961-68 (1994) RICO ACT.

STATE V. MARQUART, *123 N.M. 809* (App. 1997) *945 P.2d 1027* The Defendant has the same rights and expectations that other parties do with respects to an illegal search and seizure the exclusionary rule does apply in probation hearings.

STATE v. GUTIERREZ, 116 N.M. 431(1993) *863 P.2d 1052* New Mexico constitutional prohibition against unreasonable searches and seizures requires that we deny the state the use of evidence obtained in violation of Article II, Section 10 in a criminal proceeding.

WONG SUN V. UNITED STATES, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." STATE V. WILSON, *92 N.M. 54* (1978) *582 P.2d 826* "[T] he rational behind the exclusionary rule is that evidence obtained in violation of *Constitutional rights* must be suppressed"; The rights given an individual by a statute may be an enlargement of the constitutional guarantees A right afforded an individual by the legislature is nonetheless a right whether it is an enlargement of a constitutional or a legislative right

STATE v. EDER, *103 N.M. 211* (App. 1985) *704 P.2d 465* The American Bar Association's Standards also state that "[i]t is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena * * *." 1 ABA, Standards for Criminal Justice, The Prosecution Function, 3-3.1(d) (2d ed. 1980). The use of a subpoena or a document that looks like a subpoena for conducting pretrial interviews is unauthorized, improper, and a usurpation of judicial power. Keen. See also Durbin

v. United States, 221 F.2d 520 (D.C.Cir. 1954). The same reasoning applies to compelling witnesses to produce documents with unauthorized subpoenas. The practice has been deemed coercive and intimidating. To the extent that an unknowing witness may feel compelled to attend or produce documents, the practice amounts to perpetrating a deceit on the witness. NMSA 1978, Code of Prof.Resp. Rule 1-102(A)(4) (Repl. Pamp. 1982) defines misconduct as including engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation.

MONTANO v. ENCINIAS, 103 N.M. 515 (1985) 709 P.2d 1024 "In any event, we direct that judgments or orders in New Mexico shall not be entered in the court record in anonymity. If such a document does not indicate by counsel's signatures that all parties affected have seen it before it is presented for the judge's signature, the judge shall be satisfied by proof of service that notice of presentation has been given to attorneys for all parties."

3) **Third Issue – Due Process Probation Revocation.** United States Constitution Amendment V & XIV N.M. Constitution Article II § 14, 18, Due process right N.M.S.A. *31-21-15* the court may issue a notice to appear to answer a charge of violation. The notice shall be personally served upon the probationer.

GAGNON v. SCARPELLI, 411 U.S. 778 (1973), Due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in Morrissey v. Brewer, 408 U.S. 471, in the case of a parolee.

MORRISSEY v. BREWER, 408 U.S. 471 (1972)"At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses

(unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole

STATE v. CHAVEZ, 94 N.M. 102 (1979) 607 P.2d 640 Authorities have been cited by defendant and the State which have held delays of days and months reasonable and unreasonable, but none have statutes or rules which state a time period such as "The hearing shall then take place." The rule is prevalent that a revocation hearing will satisfy due process if the hearing is held promptly or within a reasonably short period of time after an alleged violation or after an arrest for a violation. We unhesitatingly hold that seven months delay after arrest is unreasonable. Procedural due process was denied defendant

STATE v. RUTH ANNE E., 1999-NMCA-035, 126 N.M. 670 974 P.2d 164 When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decision maker

STATE, EX REL HUMAN SERVICES DEPT, Gomez, 99 N.M. 261 (1983) 657 P.2d 117 Specifically, the court held that Gomez was deprived of due process because his AFDC termination hearing was conducted by telephone and not in the presence of a hearing officer who could observe his demeanor.

STATE v. SANCHEZ, 2001-NMCA-060, 130 N.M. 602 28 P.3d 1143, Those rights include written notice of the

violation, disclosure of evidence against the defendant, and, most pertinent to this case; the right to confront and cross-examine adverse witnesses.

STATE v. MARTINEZ, 84 N.M 295 (App. 1972) 502 P.2d 320. If the deferred sentence does not set out the conditions of probation, there are no conditions to be violated. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968

4) **Fourth Issue - Due Process Interstate Compact Federal Law of Interstate Compact for Adult Offender Supervision Federal Law.** 4 U.S.C. § 112 allows Interstate Compacts, and State of New Mexico (N.M.S.A. 31-5-20) and State of Arizona (A.R.S.31-467) are parties to the Federal Interstate Compact and the U.S.C. A. 14th Amendment (Due Process). Jurisdiction is therefore Federal Court not State District Court. United States Constitution Amendment V & XIV N.M. Constitution Article II § 14, 18, Due process right

CAMERON v. MILLS, (S.D.Iowa 1986) *645 F. Supp. 1119* Within this area, apparently, a compact that does not receive congressional consent will not be invalidated for lack of consent, but a compact that is consented to by Congress will thereby become federal law.... Thus, the final stage in this analysis is whether Congress has already consented to the compact between Iowa and Kansas. This Court believes that it has. In 4 U.S.C. § 112(a), Congress provided:

> The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements in compacts.

Examination of this statute's legislation history demonstrates that Congress also intended this statute as approval for interstate corrections compacts.

STATE V. GARDNER, 95, N.M.171 (App. 1980) 619 P.2d 847 A New Mexico court has the duty to enforce an agency regulation when compliance with the regulation is mandated by the federal or state Constitutions or state law.

5) **Fifth Issue-Appointment of Counsel.** United States Constitution Amendment VI & XIV, N.M. Constitution Article II § 14,18

STATE v. RAMIREZ, 89 N.M. 635 *(1976)* 556 P.2d 43 The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." "This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst,* supra [304 U.S. at 462, 58 S.Ct.at 1022, 82 L.Ed. at 1465].

STATE EX REL. QUINTANA v. SCHNEDAR, 115 N.M. 573 (1993), *855 P.2d 562,*The inherent power of the judiciary to appoint counsel for indigent defendants is within the unique province of the courts to ensure the constitutionality of criminal prosecutions

6) **Sixth Issue -Right to be Heard & Notification of Hearings** United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18

NMRA LR 11-101 (B) Setting of the trial and hearings

B. "All settings made by the court shall be binding upon **all parties** and attorneys properly noticed. No setting shall be vacated except upon good cause shown by written motion."

NMRA LR11-103 (C) Submission of orders, judgments, briefs, and findings

C. "Orders, decrees, and judgments shall not be submitted to the court for signature unless they have been initialed by all attorneys of record or unless the attorney submitting same certifies to the court that opposing counsel has, after five (5) days of receiving the order, decree, or judgment, failed or refused to initial same."

STATE v. VEGA, *91 N.M. 22* (1977) *569 P.2d 948 as refers to: Powell* v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84A.L.R. 527 (1932) states: "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

7) **Seventh Issue – Perjured Testimony & Right to Confrontation of witness** United States Constitution Amendment V & XIV, N.M. Constitution Article II § § 14, 15, 18 Right Against Double Jeopardy and Right to confront Witnesses against him

U.S. v. CABALLERO, 277, F.3d 1235 (10th Cir. 2002) In order to establish a due process violation, the Caballeros must show that (1) Avila's testimony was in fact false, (2) the prosecution knew it to be false, and (3) the testimony was material. Because the Caballeros failed to make contemporaneous objections at the time of Avila's testimony, we review this particular claim of prosecutorial misconduct for plain error. United States v. Gonzalez-Montoya, 161 F.3d 643, 650

STATE v. KINCHELOE, 87 N.M. 34 (1974) *528 P.2d 893,* "[A] buse of discretion" . . . implies not only an erroneous conclusion but that such conclusion was brought about by temper, humor, caprice, passion, prejudice, perversity of will, discrimination, or partiality. Certainly the exercise of honest judgment based upon facts and

conditions carefully considered and innately reasonable cannot be said to constitute an abuse of discretion.

IMBLER v. PACHTMAN, 500 F.2d 1301 (9th Cir. 1974) In 1969 the United States District Court, concluding that Imbler's conviction was secured in part by testimony the prosecution knew, or had strong reason to know, was perjured, granted him a writ of habeas corpus

MOONEY *v.* HOLOHAN, *294 U.S. 103* (1935) A criminal conviction procured by the state prosecuting authorities solely by the use of perjured testimony known by them to be perjured and knowingly used by them in order to procure the conviction, is without due process of law and in violation of the Fourteenth Amendment.

8) **Eight Issue – Right of Appeal** United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18

STATE v. CLEMONS, 83, N.M. 674 (App. 1972) *496 P.2d 167* "* * * the taking of an appeal from a judgment in a civil case completely divests the district court of jurisdiction except for the purpose of perfecting the appeal to this court and for the purpose of passing upon motions pending when the appeal is taken, or for the timely vacating of an order granting appeal.

STATE v. WHITE, 71, N.M. 342 (1962) *378 P.2d 379,* "The procedure on appeals and writs of error in criminal cases shall be governed by the procedure on appeals and writs of error in civil cases except as otherwise specified by law or rule of the Supreme Court."

9) **Ninth Issue – Speedy Trial** United States Constitution Amendment VI & XIV N.M. Constitution Article II § 14,18

SALANDRE V. STATE, 111 N.M. 422 (1991), 806 P.2d 562, Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective

defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. . .. So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

STATE v. MANZANARES, *121 N.M. 798* (1996) *918 P.2d 714* "The Sixth Amendment mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. ..... In determining whether the right to speedy trial has been violated, a reviewing court must apply the four-factor balancing test from *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-92, 33 L.Ed.2d 101 (1972). The four factors of this test are the "(1) length of delay, (2) reasons for the delay, (3) assertion of the right, and (4) prejudice to the defendant." *Salandre,* 111 N.M. at 425, 806 P.2d at 565.

10) Tenth Issue – Evidence Withheld/ Disclosure by District Attorney Rules of Criminal Procedure
United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18 NMRA 5-501: A) Information subject to disclosure., D) Certificate of compliance.

BRADY *v.* MARYLAND, *373 U.S. 83* (1963)
Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution.

UNITED STATES *v.* AGURS, *427 U.S. 97* (1976) a prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial.

STATE v. DeBORDE, 121 N.M. 601 (App. 1996)*915 P.2d 906*

AVAILABILITY OF DISCOVERY AT PROBATION REVOCATION HEARINGSUNDER NEW MEXICO'S DISCOVERY RULES

"The procedural rule governing discovery in criminal proceedings requires the State to disclose "a written list . . . of all witnesses which the prosecutor intends to call at the trial, together with any statement made by the witness." SCRA 1986, 5-501(A)(5) (Repl. 1992)."

MATHIS v. STATE, *112 N.M. 744* (1991)*819 P.2d 1302* Dismissal is appropriate if the defendant can show he will be deprived of a fair trial if he is tried without the missing evidence. *Bartlett,* 109 N.M. at 681, 789 P.2d at 629.

11) **Eleventh Issue- Deceit/ Perjury of District Attorney** N.M.S.A. 36-2-10: [Duties of attorneys.] D. "To employ for the purpose of maintaining causes confided to him such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18

STATE v. LUCERO, 1999-NMCA-102, *127 N.M. 672, 986 P.2d 468* The Supreme Court said that while there may not always be an intent to provoke a mistrial, the prosecutor's misconduct may be so egregious that double jeopardy protections must attach…The first question is whether the prosecutor's conduct was so unfairly prejudicial to the defendant that it could not be cured by

means short of a mistrial or a motion for a new trial. Breit, 1996-NMSC-067, ¶ 32. We cannot say that in this case the prosecutor's failure to disclose the existence of a second statement was so unfairly prejudicial to Defendants that it could not be cured by means short of a mistrial or a motion for a new trial. The second statement revealed the name of another witness, Medrano, who allegedly purchased clothing from Allison. Defendants assert that this was inconsistent with Allison's earlier statement that the only person he gave merchandise to was Lucero"

MATTER OF RICHARDS, *123 N.M. 579* (1997) *943 P.2d 1032*"In a previous disciplinary matter, a lawyer was publicly censured for knowingly making false statements of material fact to a tribunal. *In re Chakeres,* 101 N.M. 684, 687 P.2d 741 (1984). In a brief filed in the Court of Appeals, Chakeres stated that the testimony concerning a particular issue was uncontroverted. In fact, as Chakeres admitted to the hearing committee, the testimony on that issue was inconsistent and his statement was inaccurate. Although respondent, like Chakeres, is receiving a public censure, there is a significant difference between the two cases. Chakeres admitted his wrongdoing; respondent has not."

MATTER OF McCULLOCH, *103 N.M. 542* (1985) *710 P.2d 736* "When he acts to subvert the very system he has pledged to serve, it is obvious that he should no longer be allowed to practice law. This would be true even absent a criminal conviction."

MATTER OF DUFFY, *102 N.M. 524* (1985) *697 P.2d 943* "[W] henever an attorney is found to have engaged in intentional conduct involving dishonesty * * * there is a strong indication that a person is unfit for membership in the Bar of this State. A lawyer's license to practice is a representation that the holder is one who can be trusted to act with honesty and integrity."

MATTER OF LINDSAY, *112 N.M. 17* (1991) *810 P.2d 1237*"Ordinarily when an attorney licensed by this Court

engages in intentional misconduct involving dishonesty, he or she has been disbarred. *See, e.g., In re Hartley,* 107 N.M. 376, 758 P.2d 790(1988); *In re McCulloch,* 103 N.M. 542, 710 P.2d 736 (1985); *In re Ayala,* 102 N.M. 214, 693 P.2d 580 (1984); *In re Ortega,* 101 N.M.719, 688 P.2d 329 (1984). In addition to providing a strong deterrent to similar misconduct by other attorneys in this state, greater discipline than that previously recommended in this case will promote more uniform standards for the imposition of sanctions."

STATE v. GONZALES, 2002-NMCA-071, *49 P.3d 681* "Moreover, because the misconduct at issue did not happen in the context of trial, but rather required a separate review of events that occurred outside the courtroom, and because the misconduct is egregious in nature and implicates due process considerations, de novo review is appropriate. A showing of prosecutorial misconduct that the court described as rising into the realm of perjury or attempts to mislead this court"

STATE v. ABBATI, *99 N.J. 418* (1985) *493 A.2d 513* It is, of course, true that a trial court must dismiss an indictment if prosecution would violate the defendant's constitutional rights. *See, e.g., Barker v. Wingo,* 407 U.S. 514, 92 *S.Ct.* 2182, 33 *L.Ed.*2d 101 (1972); *State v. Szima,70 N.J. 196, cert.* den., 429 U.S. 896, 97 *S.Ct.* 259, 50 *L.Ed.*2d 180 (1976) (right to speedy trial); *State v. Barnes,84 N.J. 362* (1980) (freedom from double jeopardy); *State v.Sutton, 80 N.J. 110* (1979) (freedom from selective prosecution); *State v. Jones, 183 N.J. Super. 172* (App. Div. 198 2) (right to due process). The double jeopardy clauses of the federal and state Constitutions however do not prohibit retrial of a defendant when a prior prosecution for the same offense has ended in mistrial attributable to the inability of the jury to agree on a verdict.

STATE v. BREIT, 1996-NMSC-067, 122 N.M. 655 930 P.2d 792 In New Mexico, under the standard we adopted in *State v. Day,* 94 N.M. at 757, 617 P.2d at 146, the

double-jeopardy bar to retrial is not triggered unless "the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials."

12) **Twelfth Issue -- Abuse of Discretion United States Constitution** Amendment V & XIV N.M. Constitution Article II § 14,18

13) **Thirteenth Issue –Order of Probation/Promissory Note** United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18

STATE v. MARTINEZ, 84 N.M 295 (App. 1972) 502 P.2d 320. If the deferred sentence does not set out the conditions of probation, there are no conditions to be violated. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968

U.S. v. DIAMOND, 969 F.2d 961 *(10th Cir. 1992):*"Although a restitution order is characteristically similar to a civil judgment in that it compensates a victim for losses and remains enforceable at civil law, the court cannot convert a criminal sentence into a civil judgment. United States v. Snider, 957 F.2d 703, 707 (9th Cir. 1992) (quoting United States v. Ciambrone, 602 F. Supp. 563, 568 (S.D.N.Y. 1984)). Where a court orders restitution under the VWPA, it "may not require the defendant to execute a consent judgment or otherwise require him to secure payment `during and after the period of probation.'" United States v. Joseph, 914 F.2d 780, 786 (6th Cir. 1990). Although a court may require a defendant to make restitution under the VWPA "within a specified period or in specified installments," 18 U.S.C. § 3663(f) (1) (1988), the duration of such period or the last such installment "shall not be later than- (A) the end of the period of probation, if probation is ordered." Id. at § 3663(f) (2) (A)."

STATE v. CARRASCO, 124 N.M. 320 (App. 1997) 950 P.2d 293, it is mandatory that the actual determination of Defendant's ability to pay be made by the court

Doe v. Fauver, 3F.SUPP.2D 485 (D.N.J 1997) Parolee was entitled to preliminary injunction to prevent State Parole Board from informing his employer of his status as a parolee and the nature of his crime, given the likelihood of success on the merits on parolee's claim that employer notification infringed upon his liberty interests in violation of the due process clause of the fourteenth Amendment.

Standard of Review

The appellate courts are not bound by conclusions of law reached by the trial court and the applicable standard of review for issues of law is de novo. (Gallegos v. State, 123 N.M. 362, 940 P.2d 468 (Ct. Appd. 1997)

6. Record

The Entire proceedings were electronically recorded.

Appellant has transcription of all proceeding.

7. Prior or Related Appeals

There are two prior appeals in this case. Appellate filed a prior Direct Appeal Case No. 21, 129. A decision and mandate has been issued in that matter and is in the basis of this appeal. Appellants Spouse, Richard Smith filed appeal 23,600, mandate has been issued.

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I hereby certify that a true and correct copy of the foregoing

AMENDED DOCKETING STATEMENT were Faxed/Mailed

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On March 26, 2003.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO)
)
Plaintiff/Appellee)
)
vs.)
)
CHERI SMITH)
)
Defendant/Appellant)
)

Case No. CR 98-935-4
Court of Appeals Case 23, 725

MOTION FOR REHEARING

COMES NOW Cheri Smith, appearing pro se, pursuant to Rule 12-404, N. M. R. A. 2003, hereby submits this motion for rehearing of the Court of Appeals Memorandum Opinion filed on July 03, 2003. The Motion for Rehearing is timely if filed on or before July 18, 2003.

This Court s Memorandum Opinion proposes to dismiss the Appeal for lack of a final order. This Court's decision is 1) in conflict with a decision by the Supreme Court, 2) involves a significant question of law under the State of New Mexico

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Constitution and the United States Constitution, 3) involves an issue of substantial public interest.

The Issues in question are 1) Due Process guaranteed under the United States Constitution XIV Amendment, and State of New Mexico Article II §18; 2) Interstate Compact 31-5-20 N.M.S.A. 2003; 3) Double Jeopardy 30-1-10 NMSA 2003; 4) Illegal Search & Seizure N.M. Constitution Article II §10; and 5) Appointment of Counsel., United States Constitution Amendment VI & XIV, N.M. Constitution Article II § 14, §18.

Issue One This Court proposes to dismiss the Appeal since the "Appeal does not attach any copies of the orders appealed from See Rule 12-202(B) NMRA 2003 RP509". This rule does not address attaching copies of motions that have not been heard only orders and judgments. This Court proposes to dismiss for lack of a final order. State v Morris 69 N.M. 89, 364 P.2d 348 states: "In absence of an **express statue or rule,** no appeal will lie from anything other than a formal written order or judgment signed by the judge and filed in the case or entered upon the records of the court and signed by the thereof." The Express Rule and Statue are

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found in Interstate Compact 31-5-20 ARTICLE VIII (A) N.M.S.A. 2003, and in Double Jeopardy 30-1-10 NMSA 2003. Therefore Due Process mandates that this appeal be heard. This Court has also been informed that the Record Proper is not complete and Appellant filed a Motion for Due Process to District Court, which has been ignored and this Court could order the record to be supplemented. See Rule 12-209 (C). The Appellant previously filed a Writ of Mandamus with the State of New Mexico Supreme Court which was denied, and Appellant asserted her rights to the United States District Court (RP 547-551) which was denied and has been appealed to the United States District Court for the Tenth Circuit. The record thus must be supplemented.

Issue Two The State of New Mexico passed the Interstate Compact Statue 31-5-20 N.M.S.A. 2003; signed into law April 5, 2001 and has since passed 46 states making the statue law. The rules and regulations that are in force remain since the first meeting of the interstate compact commission was held November 18, 2002 See Interstate Compact 31-5-20, Article VIII (A) N.M.S.A. 2003. The September 28, 2001 Motion to Revoke was

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filed by the State District Attorney violating Due Process, and State Statues. STATE v. DOE, *104 N.M. 107* (App. 1986) *717 P.2d 83;* GAGNON v. SCARPELLI, 411 U.S. 778 (1973); MORRISSEY v. BREWER, 408 U.S. 471 (1972). The Appellant paroled directly to Arizona, and probation was also transferred. (RP 400) The Appellant has lived in Arizona since February 7, 2001. The 11th Judicial District Court and the District Attorney does not have subject matter jurisdiction. Lasley v Baca, 95 N.M. 791 (1981), 626 P.2d 1288 which states "Attack on subject matter jurisdiction may be made at any time in proceedings, including for the first time on appeal". Trujillo v. Serrano, 117 N.M. 273, 871 P.2d 369, (N.M. 1994) which states: "Lack of subject matter jurisdiction precludes possibility of hearing case. The State of New Mexico lacks Jurisdiction State of New Mexico Interstate Compact 31-5-20, ARTICLE VIII, (A) N.M.S.A. 2003. See The New Mexico Correction Department Policy CD 053001, Adult Interstate Compact. The District Court lacks jurisdiction to hear, Due Process and Interstate Compact Statues.

Issue Three Double Jeopardy 30-1-10 NMSA 2003 can be raised at any time. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189,

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25 L.Ed.2d 469 (1970); State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973); State v. Maestas, 87 N.M. 6 *(1974)* 528 P.2d 650 528 P.2d 650. Appellant raises the issue since This Court Ordered a Conviction to be removed, and the District Court being fully advised both by this Court by a Memorandum Opinion in November 2000 and by Appellant in a hearing on November 13, 2001 chose to add the conviction to an Order of Probation signed by the Court on November 15, 2001. Thus Double Jeopardy has been placed upon Appellant. As well as a second issue of Double Jeopardy previously raised.

Issue Four Illegal Search & Seizure N.M. Constitution Article II §10, State v. Marquart, 123 N.M. 809 (App 1997) 945 P.2d 1027; The District Attorney obtained the documents illegally, without Due Process , no subpoena was served on Appellant. The Supreme Court has ruled that The filing in United States District Court for the District of New Mexico is therefore within the Civil Rights afforded Appellant. The State District Attorney has violated State Statue, Illegal Search & Seizure, Due Process of the Constitution of the State of New Mexico, and the Constitution of

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The United States. The Appeal to this Court is also within State Statue and should be heard.

The Appellant also addressed in the Docketing Statement Double Jeopardy, which can be appealed at any time. 31-5-20 N.M.S.A. 2003 states:

> No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted.

There are two cases of Double Jeopardy that apply in Appellant's case. This Court stated "It is clear from the record summarized in detail above, that the case before us, at this time, does not concern the underlying judgment and sentence which Defendant already appealed to this Court and which resulted in a Memorandum Opinion affirming her convictions in part and reversing in part. Rather the case before us at this time concerns whether Defendant has violated the terms and conditions of her probation." The Court is correct in part, however, the Docketing Statement and the record proper states the Double Jeopardy in detail. This Court issued a

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Memorandum Opinion on November 20, 2000, which was not complied with as of November 13, 2001. When Appellant addresses the issue to the 11th Judicial District Court the State on November 13, 2001, the 11th Judicial District Court and State commit perjury, stating the conviction had been dismissed, when in fact there is no Order or an Amended Judgment & Sentence filed. The Court signs an Order of Probation (RP 405-408), which includes the conviction that this Court reversed in its Memorandum Opinion of November 20, 2000. The Order of Probation is signed on November 15, 2001, violating the Memorandum Opinion, and keeping the Appellant in Double Jeopardy. The Memorandum Opinion has still not been complied with and the Appellant is placed in Double Jeopardy, which can be appealed at any time. Collateral Estoppel applies since this Court issued Memorandum Opinion Ct. App. No. 21,129 reversing and the 11th Judicial District Court has had 2 years and 7 months to comply.

The Appellant was also placed in Double Jeopardy when the State of New Mexico District Attorney added charges from Case 98-899-6. The case was dismissed for 5-604, NMRA 1999 on June

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23, 1999 (RP 114). The District Attorney brings a second grand jury indictment on November 6, 1998 (RP1-RP 3) for additional charges from the same continuing act, as well as adding 6 misdemeanor charges on June 25, 1999 (RP 94-RP 95), from the Grand Jury Indictment in Case 98-899-6, which was dismissed as a result 5-604, not by the State. 11th Judicial District Court is informed (RP 103-RP 104) that it is double jeopardy and a violation of U.S. Constitution, Article V, and State of New Mexico Constitution, Article II, Section 15 (RP 103 –#1). Appellant's Counsel submitted there could be only one prosecution for a continuing crime. (RP 104 -#4) The Tape which was used in the search warrant in case 98-899-6 was introduced at the Trial in CR 98-935-1 (RP32-66). The State was allowed to introduce the tape as evidence of the actions of Appellant. If the tape was used and needed by the State then the only conclusion is that it is the same continuing act, with the same parties. In case 98-899-6 Appellant was indicted by the Grand Jury on October 23, 1998 on seven counts including fraud, or in the alternative embezzlement, charges of forgery, perjury, insurance code felonies and misdemeanors. (RP 114). In case 98-935-1 Appellant was indicted by the Grand

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Jury on November 6, 1998 Count 1 Fraud or in the Alternative Embezzlement and Count 2, Fraud or in the Alternative Embezzlement (RP 1-RP 2). STATE v. MAESTAS, 87 N.M. 6 (1974) 528 P.2d 650, states: "If the defendant had unlawfully possessed 42 controlled substances under Schedule I (A), § 54-11-16, supra, the prosecution cannot split up into 42 charges what was in fact one act and offense. The theft of several articles at the same time constitutes

but one offense although such articles belong to several different owners. Where a person is in unlawful possession of stolen property, stolen from two different owners at different times, there can be only one prosecution for receiving stolen property. People v. Bauer, 1 Cal.3d 368, 82 Cal.Rptr. 357, 461 P.2d 637 (1969); People v. Lyons, 50 Cal.2d 245, 324 P.2d 556 (1958); Annot. 28 A.L.R.2d 1182, 1184 et seq."

This Court gave the foregoing opinion of Double Jeopardy. The State brought the same charges from the same continuing act and used the same evidence, therefore causing double jeopardy.

This Court has also stated "The amended notice does not attach a copy of the motions appealed from. See Rule 12-202 (B) NMRA

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2003 This rule does not address any specific wording for appeals from motions denied, but not heard. Motions which are not heard are deemed denied, therefore there is no order to attach, although State Law deems it an order denied. The last motion that the Appellant filed was a Motion to Quash the Bench Warrant. (RP 539-540) which has never been ruled on, which would be the part of the Notice of Appeal. The other part of the Notice of Appeal would be Double Jeopardy. 30-1-10 N.M.S.A. 2003, and the right to appeal under the Interstate Compact , 31-5-20 N.M.S.A. 2003, these two statues would override a need for a judgment or order since the statue and rules thereof give the right to an appeal, without a judgment or order. To ignore the Statues would result in no State remedies and the Federal Courts would then have jurisdiction, since it would be a violation of Civil Rights of Appellant under the Constitution of the United States, and the Constitution of the State of New Mexico. This Court has previously stated "unusual circumstance which would warrant permitting an untimely appeal might arise if the delay was the result of judicial error." To deny a party the constitutional right to an appeal because of a mistake on the part of the court runs against

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the most basic precepts of justice and fairness. The record shows that Appellant is not noticed on anything even when Counsel withdraws. This court has previously stated in State v Peppers, 110, N.M. 393, 796 P.2d 614 (Ct App. 1990) "that Appellant's appeal was the consequence of ineffective assistance of counsel, the appeal was treated as if the notice had been filed timely", Counsel entered his appearance on November 19, 2001, (RP 409) and withdraws of January 16, 2003 (RP 536-538). The only motions Counsel files in this case over the course of 14 months is the Motion to Quash Subpoena Duces Tecum (RP 435), two motions for continuance of hearings (RP419 & RP 465) neither is as a result of Appellant; and Motion to withdraw (RP 536-538). All motions otherwise filed were done by Appellant. Double Jeopardy occurred Counsel, 11th Judicial District Court, and State District Attorney were apprised. Counsel does not file motion to dismiss. Counsel does not appeal anything to Court of Appeals, fundamental error occurs. The transcripts have been provided to this Court so they have an accurate account of what has been done, along with the Record Proper.

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The Appellant has raised the issue of Double Jeopardy, Violation of Due Process, in the Amended Docketing Statement. The Docketing Statement raises 13 issues in detail the violations of State Statues, Procedural law, Constitution of the United States, and the Constitution of the State of New Mexico, as well as case law. The issues at hand can be appealed since the record proper and transcripts clearly validate the events. The 11th Judicial District Court has had a chance to rule on issues and the denials of fundamental rights such as due process have occurred. The Motion to Dismiss filed November 13, 2001 (RP 385) even states "5.The Motion for Probation Revocation was not prompted by the Probation Officer, or any report, but entirely as the actions taken by Chief Deputy Assistant District Attorney." The Court knows there was no referral of revocation just the Motion to Revoke (RP 330). The 11th Judicial District denies Appellants due process rights by denying the Motion on March 6, 2002 (RP 426). The issues raised go to how the convictions were obtained which violates Due Process and numerous Civil Rights of Appellant. Convictions should reverse due to Double Jeopardy and violation of Due Process.

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WHEREFORE, the Appellant CHERI SMITH, respectfully requests this Court to enter an order assigning this case to the summary calendar proposing summary reversal. Cheri Smith also requests such other and further relief as this Court Deems just and proper. PRO SE AND LAYMAN AT LAW

Signed this 4th Day of May 2003

By: _____

Cheri Smith
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Tempe, AZ 85284-0015
crsmith82@yahoo.com

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CERTIFICATE OF SERVICE

I hereby Cheri Smith, hereby certify that on May 4, 2003 a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PROPOSED SUMMARY DISMISSAL** were Faxed/Mailed to the following:

Clerk of the New Mexico Court of Appeals
Supreme Court Building
P O Box 2008
Santa Fe, NM 87504
Facsimile 505-827-4946
Telephone 505-827-4925

Appellate Division Attorney General
P O Box 1508
Santa Fe, NM 87501
Facsimile 505-827- 5826
Telephone 505-827- 6000

On May 4, 2003

Respectfully submitted,

By: _____

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff-Appellee,

VS.

CHERI SMITH, Defendant-Appellant.

No. 23,725

COURT OF APPEALS
STATE OF NEW MEXICO
JANE WALLACE, CLERK
2005 AUG -6 AM 9:52

A. JOSEPH ALARID
Presiding Judge
JAMES J. WECHSLER
Chief Judge
RODERICK T. KENNEDY
Judge

ORDER ON MOTION FOR REHEARING

In this cause, a motion for rehearing having been filed by Appellant, and consideration having been had by all of the panel members of the original panel, **IT IS ORDERED** that the motion for rehearing is hereby DENIED.

Presiding Judge